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# **Early access to legal aid in criminal justice processes:**

a handbook for policymakers  
and practitioners

**CRIMINAL JUSTICE HANDBOOK SERIES**

This handbook was developed in consultation with the Open Society Justice Initiative.

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UNITED NATIONS OFFICE ON DRUGS AND CRIME  
Vienna

# **Early access to legal aid in criminal justice processes: a handbook for policymakers and practitioners**

CRIMINAL JUSTICE HANDBOOK SERIES



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## Preface

This *Handbook* is intended as a practical guide to developing and implementing policies and programmes to ensure early access to legal aid, including by implementing the international standards set by the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. It is designed to address some of the challenges that practitioners face in ensuring such access to legal aid, including by:

- Explaining the provisions of the United Nations Principles and Guidelines relating to early access to legal aid
- Systematically exploring the challenges and obstacles to effective provision of early access to legal aid
- Providing policymakers, civil servants and practitioners (lawyers, judges, prosecutors, police officers, detention officers, civil society actors and others) with tools for capacity development to assist them in overcoming such challenges and obstacles
- Suggesting some practical and innovative solutions, using examples from different jurisdictions
- Providing training resources for legal aid providers and the police (or other investigative agencies).

Chapter I, on early access to legal aid, sets out a rationale for why the provision of early access to legal aid contributes to a fair, humane and efficient criminal justice system, as well as how it contributes to human development. Following a brief assessment of the current state of affairs globally in terms of early access to legal aid, the chapter surveys relevant international norms and standards as they relate to this area, and includes a section on definition of key terms.

Chapter II, on the benefits and challenges of relating to early access to legal aid, uses examples from a range of countries to explore the benefits to both suspects and accused persons, and to the wider community, of providing such early access. It then assesses the major challenges and barriers to providing early access to legal aid through case studies to illustrate how such schemes work in practice.

Chapter III, on the essential legal framework of the right to early access, examines the legislative and regulatory requirements for the effective establishment and implementation of early access to legal aid.

Chapter IV, on organization and delivery of early access to legal aid, reviews two discrete elements of schemes for providing early access: the institutional arrangements for organizing, funding and operating such schemes, and examines the mechanisms by which early access may be delivered and the various models for delivering legal services to those suspected or accused of crime. The chapter also deals with the important issue of ensuring quality of service.

Chapter V, on the roles and responsibilities of legal aid providers, includes a detailed account of the duties and functions of lawyers, paralegals and other legal aid actors in providing legal aid at the early stages of the criminal justice process.

Chapter VI, on the roles and responsibilities of the police, prosecutors and judges, recognizes the key part played by such officials in ensuring effective early access to legal aid and examines their roles and responsibilities in ensuring that this right is respected in practice.

Chapter VII, on developing strategies for providing early access to legal aid, offers a guide to formulating strategies for implementing early access provisions based on the United Nations Principles and Guidelines.

The annexes include sample training curricula for legal aid providers and the police (and other investigative agencies), along with other materials that can be useful for establishing effective schemes for providing early access to legal aid.

## Acknowledgements

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# Contents

	<i>Page</i>
Preface . . . . .	<i>iii</i>
Glossary of terms . . . . .	<i>ix</i>
I. Early access to legal aid . . . . .	1
A. Introduction . . . . .	1
B. Current state of affairs . . . . .	3
C. International norms and standards . . . . .	6
II. Benefits and challenges relating to early access to legal aid . . . . .	9
A. Introduction . . . . .	9
B. Benefits of early access for suspects and accused persons . . . . .	11
C. The wider benefits of early access to legal aid . . . . .	26
D. Challenges and barriers to early access . . . . .	35
III. The right to early access: the essential legal framework . . . . .	43
A. Introduction . . . . .	43
B. The right to early access to legal aid . . . . .	45
C. Information about the right to early access . . . . .	51
D. Waiver of the right to legal aid . . . . .	54
E. Giving effect to a request for early access to legal aid . . . . .	56
F. Regulating the role of the legal aid provider . . . . .	57
G. Guaranteeing the right to early access to legal aid . . . . .	59
IV. Organization and delivery of early access to legal aid . . . . .	63
A. Introduction . . . . .	63
B. Legal aid institutions, responsibilities and funding . . . . .	64
C. Delivering early access to legal aid . . . . .	69
D. Models of legal aid provision . . . . .	73
E. Assuring quality of service . . . . .	83
V. Role and responsibilities of legal aid providers . . . . .	89
A. Introduction . . . . .	89
B. Role of the legal aid provider . . . . .	90
C. Responsibilities of legal aid providers . . . . .	91

VI. Roles and responsibilities of the police, prosecutors and judges . . . . .	103
A. Introduction . . . . .	103
B. Role and responsibilities of the police and other investigative authorities. . . . .	103
C. Role and responsibilities of prosecutors. . . . .	108
D. Role and responsibilities of judges. . . . .	110
VII. Developing strategies for early access to legal aid . . . . .	115
A. Introduction . . . . .	115
B. Developing a national strategy for early access to legal aid. . . . .	116
C. The legal framework for early access to legal aid . . . . .	117
D. Organization and delivery of early access to legal aid . . . . .	118
E. Role and responsibilities of legal aid providers . . . . .	121
F. Roles and responsibilities of the police, prosecutors and judges . . . .	122

*Annexes*

I. Training curriculum for legal aid providers . . . . .	125
II. Training curriculum for police officers . . . . .	131
III. Useful materials. . . . .	135
IV. Model letter of rights . . . . .	139
V. Sample checklists for legal aid providers. . . . .	141

## Glossary of terms

Some terms used in this *Handbook* have a particular meaning, or are used for a particular purpose. The definitions set out below are either taken directly from the text of the United Nations Principles and Guidelines, or are designed to clarify the meaning of certain terms.

### Legal aid

The term “legal aid” is defined in the United Nations Principles and Guidelines as follows:

“Legal aid” includes legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require. Furthermore, “legal aid” is intended to include the concepts of legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes.<sup>1</sup>

The United Nations Principles and Guidelines are primarily concerned with the right to legal aid, as distinct from the right to legal assistance,<sup>2</sup> and are intended to build on and give effect to the international norm that a person is entitled to defend himself or herself through legal assistance.<sup>3</sup> The definition of “legal aid” includes both the service provided—legal advice, assistance and representation<sup>4</sup>—and the provision of that service at no cost to persons entitled to it. For the purposes of this *Handbook*, it is sometimes necessary to make a distinction between the two. It is also necessary to distinguish between legal services funded by the State (whether national, regional or local) and those funded by other means, such as by civil society organizations. Therefore, the following definitions are adopted for the purpose of this *Handbook*.

Legal aid means legal advice, assistance and/or representation and the provision of it at no cost to the person entitled to it. For the purposes of this handbook, “legal aid” is not used to denote legal education, nor to denote alternative dispute resolution or restorative justice processes, which are referred to specifically as appropriate.

Where it is necessary to make a distinction between legal aid and legal advice, assistance and representation, the definitions below apply.

State-funded legal aid means State funding of legal advice, assistance and/or representation, which is provided at no cost to the recipient, or state subsidy of the cost to the recipient (that is, the recipient pays a contribution, with the remainder of the cost paid for by the State).

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<sup>1</sup>General Assembly resolution 67/187, para. 8.

<sup>2</sup>Ibid., para. 13.

<sup>3</sup>International Covenant on Civil and Political Rights, art. 14, para. 3 (*d*).

<sup>4</sup>It also includes other services, such as legal education, information and mechanisms for resolving disputes. In the interests of clarity, for the purposes of the present *Handbook* such services are excluded from the definition and are explicitly referred to, as appropriate.

Legal advice, assistance and representation means the service provided to the recipient. “Legal advice” refers to the provision of advice about the application of relevant law to the circumstances of the recipient, and the actions that the person might appropriately take. “Assistance” means assistance in taking any appropriate action that the person might take, whether by taking the action on their behalf or by assisting them to take that action.<sup>5</sup> “Representation” refers to the act of speaking on behalf (that is, “acting” on behalf) of the recipient before a prosecutor, court or tribunal. Typically, legal advice, assistance and representation are provided by a lawyer or paralegal, although, depending on the country and the circumstances, they may be provided by another suitably trained person.

### Early access to legal aid

For the purposes of this *Handbook*, early access to legal aid means access to legal aid from the time that a person is suspected of, arrested or detained in respect of, or charged with a criminal offence (whichever is the earliest) and throughout the period up to and including the first appearance before a judge for the purpose of determining whether the person is to be detained or released pending trial.<sup>6</sup> Defining early access in this way does not go beyond the right to legal aid as provided for by the United Nations Principles and Guidelines, but rather focuses the application of this *Handbook* on the early stages of the criminal justice process.

### “Arrested”, “detained”, “suspected” and “charged”

The terms “arrest” and “detained” are defined in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,<sup>7</sup> and are adopted for the purposes of the United Nations Principles and Guidelines.<sup>8</sup>

Arrest means the act of apprehending a person for the alleged commission of an offence or by the action of an authority. Thus, a substantive, rather than a formal, approach to the meaning of arrest should be adopted.<sup>9</sup>

Detained person means any person deprived of personal liberty except as a result of conviction for an offence.

Detention means the condition of detained persons as defined above.

The term “suspected” is not explicitly defined, but the United Nations Principles and Guidelines note that “the right to legal aid of suspects arises before questioning, when they become aware that they are the subject of investigation, and when they are under threat of abuse and intimidation, e.g. in custodial settings”.<sup>10</sup>

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<sup>5</sup>This may include, for example, seeking to negotiate with the police or taking appropriate action to further the interests of the person while he or she is held in police custody.

<sup>6</sup>The laws of different countries provide for a range of maximum periods before which an arrested person must be produced before a judge, so the temporal scope of early access will vary accordingly.

<sup>7</sup>General Assembly resolution 43/173, annex.

<sup>8</sup>United Nations Principles and Guidelines, para. 10.

<sup>9</sup>This is the approach taken by the European Court of Human Rights. See European Court of Human Rights, *Subinski v. Slovenia*, Application No. 19611/04, Judgement of 18 January 2007, paras. 62-63. See also the approach taken by the United States Supreme Court in *Miranda v. Arizona*, 384 US 436 (1966), and the Supreme Court of the United Kingdom of Great Britain and Northern Ireland in *Ambrose v. Harris* [2011] UKSC 43.

<sup>10</sup>United Nations Principles and Guidelines, second footnote to para. 10.

The term “charged” is also not explicitly defined in the United Nations Principles and Guidelines. In applying the term to the range of States that are signatories to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights has defined “charge” as follows:

“Charge”... may be defined as ‘the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence’, a definition that also corresponds to the test whether ‘the situation of the [suspect] has been substantially affected’.<sup>11</sup>

It is suggested that the same approach should be adopted for the purposes of this *Handbook*.

### Criminal justice system and criminal offence

The United Nations Principles and Guidelines are concerned with access to legal aid in criminal justice systems, and adopt the definition of “justice process” found in the Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime:

“Justice process” encompasses detection of the crime, making of the complaint, investigation, prosecution and trial and post-trial procedures, regardless of whether the case is handled in a national, international or regional criminal justice system for adults or juveniles, or in a customary or informal system of justice.<sup>12</sup>

For the purposes of the United Nations Principles and Guidelines, “criminal justice process” also encompasses extradition, transfer of prisoners and mutual legal assistance proceedings.<sup>13</sup>

### Legal aid provider

The lawyer or paralegal (or other suitably trained person) who provides legal aid.<sup>14</sup>

### Legal aid service provider

The organization that provides legal aid services, or on behalf of which a legal aid provider works. The United Nations Principles and Guidelines provide that lawyers are the “first” providers of legal aid, but that States may involve a wide range of stakeholders as legal aid service providers such as non-governmental organizations (NGOs), community-based organizations, charitable organizations, professional bodies or associations, and educational institutions.<sup>15</sup>

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<sup>11</sup>European Court of Human Rights, *Eckle v. Germany*, Application No. 8130/78, Judgement of 15 July 1982, para. 73.

<sup>12</sup>Economic and Social Council resolution 2005/20, annex, para. 9 (c).

<sup>13</sup>United Nations Principles and Guidelines, footnote to para. 14 (principle 1).

<sup>14</sup>United Nations Principles and Guidelines, para. 9.

<sup>15</sup>*Ibid.*



# I. Early access to legal aid

## A. Introduction

The early stages of the criminal justice process—the first hours or days of police custody or detention—are crucial for those who have been arrested or detained in respect of a criminal offence. Decisions made and actions taken, or not taken, will determine their ability to effectively defend themselves, the length of their detention, whether and when they are produced before a court, whether appropriate decisions are made about prosecution or diversion from the criminal justice system and, ultimately, whether they receive a fair trial.

During this period, suspects and accused persons are at greatest risk of torture or other forms of ill-treatment, ranging from neglect and demands for bribes, to coerced confessions and unlawful detention.<sup>16</sup> Their treatment and experiences will not only affect their perceptions of the police and other law enforcement officials and the criminal justice system, but also have an impact on their families, friends and communities, potentially undermining trust in the criminal justice system as a whole.<sup>17</sup> For example, such treatment and experiences may have a critical impact on the willingness of victims and witnesses to cooperate with the police and the criminal justice process.

Many of those arrested or detained are poor, ill-educated or disadvantaged for some other reason. They often lack the knowledge or experience needed to understand and navigate the criminal justice system and also have limited financial resources to effectively navigate the system.<sup>18</sup> Many are children, that is, a person who is under 18 years of age,<sup>19</sup> who, in addition to these disadvantages, may lack the legal authority to make decisions on their own, and who need support to ensure that they are dealt with appropriately.

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<sup>16</sup>Moritz Birk and others, *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk* (New York: Open Society Foundations, 2011).

<sup>17</sup>T Tyler, *Why People Obey the Law* (Princeton, New Jersey, Princeton University Press, 2006); J Jackson and others, “Why do people comply with the law? Legitimacy and the influence of legal institutions”, *British Journal of Criminology*, vol. 52, No. 6 (2012), pp. 1051-1071.

<sup>18</sup>The Federal Court of Justice of Germany stated explicitly that at the time of the first police interrogation, the suspect usually is not prepared for such a situation, without any adviser and in an environment he is not used to, often confused by events and afraid, due to the scenario of the interrogation. (Germany, *Entscheidungen des Bundesgerichtshof in Strafsachen*, 38, 214).

<sup>19</sup>Convention on the Rights of the Child (United Nations, *Treaty Series*, vol. 1577, No. 27531), art. 1.

The early stages of the criminal justice process are also crucial for the efficiency and effectiveness of the criminal justice system as a whole. During this period, the extent and quality of evidence collected, and thus the prospects for a fair trial and appropriate decisions about guilt or innocence, are determined. Decisions are made about pretrial detention that have far-reaching consequences not only for the individuals concerned and their ability to support their families and dependants,<sup>20</sup> but also with regard to the resources needed to maintain the facilities in which they are incarcerated.

Prompt access to legal advice and assistance is the key to guaranteeing a fair trial and the rule of law.<sup>21</sup> Early intervention by legal aid providers helps to ensure that rights are respected, improves the efficiency and fairness of the criminal justice system and represents an important safeguard against torture and other forms of ill-treatment.<sup>22</sup> It also has the potential to reduce costs, both for the system overall and for the individual and families concerned, for example, in terms of the costs involved in paying bribes or the loss of income resulting from detention.

State-funded legal aid, which can be complemented by other legal aid service providers, is essential in ensuring the availability of legal advice and assistance and in terms of securing legal empowerment of the poor. Without access to legal aid, they are vulnerable to unfair treatment, unlawful actions and demands for bribes. In many countries, arrest can result in detention for months, and sometimes years, without charge, trial or conviction. Detention facilities are often seriously overcrowded and dangerous, and are breeding grounds for torture, criminality and corruption. They also act as incubators of disease; the release of detainees still suffering from untreated diseases contracted while in prison adversely affects the health of the wider community.<sup>23</sup> Access to legal aid empowers the poor, enabling them to strengthen their voice and standing and to demand and exercise their rights. Empowering people to be able to access justice, including through the provision of legal aid services, is critical to the reduction of poverty and the prevention of conflict.<sup>24</sup>

As the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems state, legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. It provides a foundation for other fundamental rights, including the right to a fair trial, and is an important safeguard that ensures fundamental fairness and public trust in the criminal justice

<sup>20</sup>Open Society Foundations and United Nations Development Programme, *The Socioeconomic Impact of Pretrial Detention* (New York: Open Society Foundations, 2011). In the Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World (General Assembly resolution 65/230, annex, para. 52), States Members of the United Nations recommended that Member States should endeavour to reduce pretrial detention, where appropriate, and promote increased access to justice and legal defence mechanisms.

<sup>21</sup>Ed Cape, *Improving Pretrial Justice: The Roles of Lawyers and Paralegals* (New York: Open Society Foundations, 2012), sect. 4.1-4.7.

<sup>22</sup>Office of the United Nations High Commissioner for Human Rights, Association for the Prevention of Torture and Asia Pacific Forum of National Human Rights Institutions, *Preventing Torture: An Operational Guide for National Human Rights Institutions*, HR/PUB/10/1 (May 2010).

<sup>23</sup>Joanne Csete and Dirk van Zyl Smit, *Pretrial Detention and Health: Unintended Consequences, Deadly Results* (New York: Open Society Foundations, 2011).

<sup>24</sup>United Nations Development Programme, *Envisioning Empowerment: A Portfolio of Initiatives for Achieving Inclusion and Development* (New York: UNDP, 2009), available from [www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/legal-empowerment/envisioning-empowerment/Envisioning%20Empowerment\\_full.pdf](http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/legal-empowerment/envisioning-empowerment/Envisioning%20Empowerment_full.pdf).



process.<sup>25</sup> It can contribute to States' overall development objectives, for example, by preventing the most disadvantaged from falling deeper into poverty by ensuring that they have access to services that can help protect their rights.

This *Handbook* is concerned with early access to legal aid for those who are arrested, detained or suspected or accused of, or charged with, committing a crime. In adopting this focus, the *Handbook* is intended neither to divert attention away from victims and witnesses, nor to undervalue the importance of providing appropriate legal aid for them. Rather, it is in recognition of the fact that the needs relating to legal services of suspects and accused persons on the one hand, and victims and witnesses on the other, are different. While both sets of needs must be taken into account and appropriately catered for, in the interests of justice and of a fair trial, the ways in which those needs are catered for differ, as do the mechanisms for delivering legal aid to those involved. Moreover, while restorative justice and other community-based approaches to dealing with crime may involve victims, witnesses and those suspected or accused of crime, it is generally inappropriate for a legal aid provider to provide legal services to both suspects/accused persons and victims/witnesses, given their different and sometimes conflicting needs. Increasingly there are more multidisciplinary approaches being adopted in relation to the provision of legal aid, which recognize the multidimensional nature of problems people face, particularly people who have extremely limited resources and who are living at or below the margins of poverty. While this *Handbook* may not directly address some of these issues, it does recognize that the situation on the ground can often be quite complex and criminal cases may also have civil/family/administrative elements to them which require a comprehensive and holistic approach to legal aid.

## B. Current state of affairs

The extent to which early access to legal aid in criminal proceedings is available varies considerably around the world. It is often difficult to establish an accurate picture, because in many countries statistics are not routinely collected and other evidence is limited.<sup>26</sup> To some extent, the differences may be accounted for by the relative wealth of nations or by the procedural tradition that informs a particular criminal justice system. But this is not the whole story. There is significant variation among countries of similar wealth, and among countries with similar procedural traditions. Even in countries where the law provides for a right of early access to a lawyer, effective access to legal advice and assistance at the early stages of the criminal justice process is often the exception rather than the rule.

A right to legal advice and assistance at the early stages of the criminal justice process is provided for in the constitution or by legislation in many countries, and in some countries the law provides that legal assistance is compulsory during police interrogation. For example, the Constitution of South Africa provides that arrested and detained persons are entitled to a lawyer from the moment of their arrest or detention,

<sup>25</sup>United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (General Assembly resolution 67/187, annex), para. 1.

<sup>26</sup>For example, the *Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the Rights of Access to a Lawyer and of Notification of Custody to a Third Person in Criminal Proceedings*, European Commission document SEC (2011) 686 (Brussels, 8 June 2011), found that six European Union Member States were unable to provide statistics on national expenditure on legal aid in criminal proceedings.

and similar provisions are contained in the New Zealand Bill of Rights Act 1990.<sup>27</sup> Some jurisdictions in Europe, such as Belgium, France and Scotland, introduced a right of early access to a lawyer in 2010, largely as a result of a decision of the European Court of Human Rights.<sup>28</sup> In many Latin American countries, suspects have a legal right to consult a lawyer while in police detention, and in Argentina, Colombia and Peru, among others, the presence of a lawyer is mandatory in police interrogations or, as in Mexico, in interrogations by prosecutors.

However, even in those countries where a right to legal advice or assistance at the early stages of the criminal justice process is guaranteed by law or is mandatory, the effectiveness of the right may be limited. In some countries, the law imposes limits on the extent of the right. For example, in the Netherlands, while a suspect in police custody is entitled to consult a lawyer, the general rule is that he or she has no right to the presence of a lawyer during police interrogation. Similarly, in Canada an arrested person has a right under the Canadian Charter of Rights and Freedoms<sup>29</sup> to retain and instruct a lawyer, but the right does not extend to the presence of the lawyer during interrogation.<sup>30</sup> A further limitation found in some countries is that the right to legal assistance may be delayed or denied in certain circumstances. For example, in Austria the right of an arrested person to access legal advice can be temporarily limited to general advice if this appears necessary to avoid obstruction of the investigation.<sup>31</sup> In other countries, limitations on the right are being removed. For example, in China the previous limitation on the right to legal assistance, which applied only after the first interrogation, has been removed, and the right now applies from the time at which the first interrogation is conducted or compulsory investigative measures are carried out.<sup>32</sup> (See chapter III below for a detailed discussion of essential legal frameworks for establishing early access to legal aid.)

The availability of State-funded legal aid to give effect to the right to legal advice and assistance is limited or non-existent in many countries. In most countries on the African continent, access to legal aid is generally not available at any stage of the criminal justice process, and is rarely available at the police station or during the investigative stage. Even when a formal legal aid system exists, its coverage is often inadequate.<sup>33</sup> However, there are some notable exceptions, for example, schemes in Angola, Malawi, Nigeria, Sierra Leone, South Africa, the Sudan and Uganda which use lawyers, law graduates or paralegals to provide early access to legal aid.<sup>34</sup> In Europe, the extent to which State-funded legal aid is available at the early stages of the criminal justice process varies considerably. In those countries which apply a means test, eligibility levels (i.e. income thresholds) are often low, and generally a relatively small proportion of suspects and accused persons receive legal advice and

<sup>27</sup>Sect. 23, para. 1.

<sup>28</sup>See *Salduz v. Turkey* (European Court of Human Rights, Grand Chamber, Application No. 36391/02, Judgement of 27 November 2008).

<sup>29</sup>Art. 10 (b).

<sup>30</sup>*R v Sinclair*, 2010 SCC 35.

<sup>31</sup>Code of Criminal Procedure, para. 59 (1).

<sup>32</sup>Criminal Procedure Law 2012, art. 33.

<sup>33</sup>United Nations Office on Drugs and Crime, *Access to Legal Aid in Criminal Justice Systems in Africa: Survey Report* (Vienna, 2011), p. 21.

<sup>34</sup>*Ibid.*, pp. 31-32.

assistance while in police custody.<sup>35</sup> In the United States, the celebrated 1966 Supreme Court decision in *Miranda v Arizona*<sup>36</sup> established that a suspect arrested by police must be informed of his or her right to a lawyer before the commencement of any police questioning. However, schemes for providing early access vary considerably within and among different local and regional jurisdictions. Many of these jurisdictions are overburdened, with poor standards of representation, and only a minority of suspects are able to effectively exercise their right to a lawyer.<sup>37</sup> In New Zealand, the Legal Services Agency operates a police detention legal assistance scheme that is available regardless of a person's financial means, but advice is normally provided by a lawyer on the telephone.<sup>38</sup> In Australia, the right of suspects in police custody to consult a lawyer is generally provided for by law, but there are no schemes for the provision of duty lawyers at police stations and, in practice, with the exception of Aboriginal and juvenile suspects (who may have access to Aboriginal legal services or telephone advice), access to legal assistance at the police station is rare.

There are many different models for delivering legal advice and assistance to suspects and accused persons at the early stages of the criminal justice process. Many countries in Europe, for example, use lawyers in private practice to deliver legal aid services, with a variety of approaches to remuneration. Others, such as many Latin American countries, Georgia, Israel, and some states in the United States, deliver legal aid in criminal cases through a public defender system. Providing legal aid services in this way can have significant advantages over other forms of provision, but as experience in the United States and Latin America demonstrates, such schemes are often underfunded and lack sufficient resources to provide legal aid at the early stages of the criminal justice process. In some countries, there is an insufficient number of lawyers or of lawyers willing and able to provide early access to legal aid. Some countries, such as Malawi, Sierra Leone and South Africa, have pioneered the use of paralegals to address this problem. (See chapter IV below for a description of models for delivering legal aid and the benefits and challenges of incorporating paralegals.)

Overall, the right to early access to legal aid provided for by the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems will require concerted action in many countries to ensure compliance. In some countries, compliance will be a goal that will take some time to achieve. However, this *Handbook* contains many examples of good practices and innovative approaches, which can be a valuable resource for those who want to make early access to legal aid in criminal justice systems a reality.

<sup>35</sup>See generally Ed Cape and others, *Effective Criminal Defence in Europe* (Antwerp, Belgium, Intersentia, 2010), Ed Cape and Zaza Namoradze, *Effective Criminal Defence in Eastern Europe* (Soros Foundation-Moldova, 2012) and S. Schumann, K. Bruckmüller and R. Soyer, eds., *Pre-trial Emergency Defence* (Antwerp, Belgium, Intersentia, 2012), p. 363.

<sup>36</sup>*Miranda v Arizona*, 384 US 436 (1966).

<sup>37</sup>See, for example, R. Leo, *Police Interrogation and American Justice* (Cambridge, Massachusetts, Harvard University Press, 2008), p. 280; and K. Houppert, *Chasing Gideon: The Elusive Quest for Poor People's Justice* (New York, New Press, 2013).

<sup>38</sup>It may be provided in person, however, if the case is complex or the suspect is vulnerable.

## C. International norms and standards

The United Nations Principles and Guidelines are drawn from international standards, the ultimate foundation of which is the right to a fair trial as defined by the Universal Declaration of Human Rights.<sup>39</sup> Article 11 of the Declaration refers to the right of a person charged with a criminal offence to a “public trial at which he has had all the guarantees necessary for his defence”. This is expanded upon in the International Covenant on Civil and Political Rights, in the following terms:

3. In the determination of any criminal charge against him, everyone shall be entitled... (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.<sup>40</sup>

Similar provisions are contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms (art. 6, para. 3 (c)); the American Convention on Human Rights (art. 8, para. 2), although it is open to signatory States to determine what State-aided legal assistance is to be provided; the Arab Charter on Human Rights (art. 16); and the African Charter on Human and Peoples’ Rights (art. 7, para. 1 (c)), together with the United Nations Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa of the African Commission on Human and Peoples’ Rights.<sup>41</sup>

The Basic Principles on the Role of Lawyers<sup>42</sup> provide that “all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings” (principle 1), and that any such person “shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services” (principle 6).<sup>43</sup>

The United Nations Principles and Guidelines are intended as a “useful framework to guide Member States on the principles on which a legal aid system in criminal justice should be based”.<sup>44</sup> The key provisions relevant to early access to legal aid are referenced throughout this *Handbook*.

<sup>39</sup>Universal Declaration of Human Rights (General Assembly resolution 217 A (III)), art. 11, para. 1.

<sup>40</sup>International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI), annex), art. 14, para. 3 (d).

<sup>41</sup>African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2001, sect. H.

<sup>42</sup>*Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. 1, sect. B.3, annex.

<sup>43</sup>For other international instruments containing provisions regarding legal aid, see the report of the Special Rapporteur on the independence of judges and lawyers (A/HRC/23/43), chap. III.

<sup>44</sup>General Assembly resolution 67/187, para. 2.

## SUMMARY OF KEY ISSUES

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1. The early stages of the criminal justice process—the first hours or days of police custody or detention—are crucial for those who have been arrested or detained in respect of a criminal offence. The way in which suspects and accused persons are treated, up to and including their first court appearance, has a significant impact on the efficiency and effectiveness of the criminal justice system.
2. Legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. It provides a foundation for other fundamental rights, including the right to a fair trial, and is an important safeguard that ensures fundamental fairness and public trust in the criminal justice process.
3. Access to legal aid during the early stages of the criminal justice process protects people at a time when they are most vulnerable, and is a key safeguard against torture and ill-treatment. It also ensures that poor and vulnerable people are treated with respect and dealt with fairly, and helps to strengthen criminal justice institutions and make them more responsive to the needs of citizens.
4. Existing provisions for early access to legal aid vary significantly around the world. While in many countries the law provides for a right to legal advice and assistance at the early stages of the criminal justice process, in practice effective access to advice and assistance is often not available.
5. The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems are drawn from, and are aimed at giving effect to, international standards, including the right to a fair trial, as defined by the Universal Declaration of Human Rights (article 11) and the International Covenant on Civil and Political Rights (article 3).



## II. Benefits and challenges relating to early access to legal aid

### A. Introduction

Access to legal aid, especially in the early stages of the criminal justice process, is a central component of ensuring access to justice for poor and disadvantaged groups, who often have less access to information and are less aware of their rights and entitlements. The imbalance of power between State authorities and the person being arrested is in all cases quite significant, but the gap is more pronounced in cases in which members of poor and marginalized groups have been arrested and detained, as they are often not aware of their rights or do not have the resources to retain legal advice and representation. The benefits of early access to legal aid to ensure that everyone is equally protected by the law represent an end in itself. In addition, early access to legal aid can help in ensuring that people do not languish in pretrial detention, which in turn can significantly reduce the costs to individuals, families and communities. A study by the United Nations Development Programme (UNDP) and the Open Society Justice Initiative in West Africa, for example, indicated that pretrial detainees often lose their jobs, are forced to abandon their education, are evicted from their homes, are exposed to disease and suffer physical and psychological damage. Families suffer from lost income, and children are separated from their families and may not be able to continue their education. Additionally, communities and the State must absorb the lost potential and the socioeconomic impact of pretrial detention, including the potential negative effect on overall human development and poverty.

The United Nations Principles and Guidelines recognize that access to legal aid, in addition to being a right in itself, also has instrumental benefits for suspects and accused persons, for the criminal justice system and for the wider community.

#### United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>

##### Introduction

3. A functioning legal aid system, as part of a functioning criminal justice system, may reduce the length of time suspects are held in police stations and detention centres, in addition to reducing the prison population, wrongful convictions, prison overcrowding and congestion in the courts, and reducing reoffending and revictimization. It may also protect and safeguard the rights



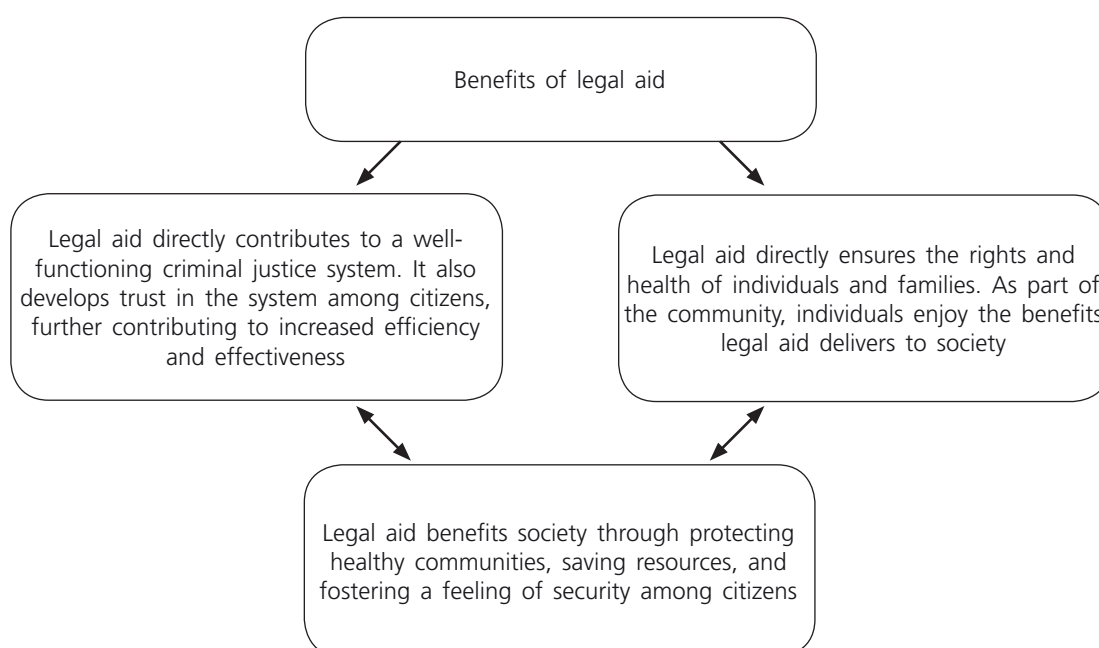
of victims and witnesses in the criminal justice process. Legal aid can be utilized to contribute to the prevention of crime by increasing awareness of the law.

4. Legal aid plays an important role in facilitating diversion and the use of community-based sanctions and measures, including non-custodial measures; promoting greater community involvement in the criminal justice system; reducing the unnecessary use of detention and imprisonment; rationalizing criminal justice policies; and ensuring efficient use of State resources.

<sup>a</sup> Adopted by the General Assembly in its resolution 67/187 of 20 December 2012.

In some cases, the cost of legal aid services makes States reluctant to provide them at the early stages of the criminal justice process. Unfortunately, expenditure on legal aid tends to be calculated without considering the social benefits and economic savings such services bring, in addition to their positive impact on the rights of individuals and their families. Some benefits are easily quantifiable, such as the savings to the prison system resulting from fewer persons held unnecessarily in pretrial detention. Other benefits are more difficult to quantify and, as a result, are often neglected, but it is important to recognize their value when it comes to building trust in the community and protecting the health of all people. At times, these unquantifiable benefits can be even more valuable than those that are quantifiable, especially in conflict or post-conflict situations. Therefore, it is essential to consider the benefits of providing legal aid alongside the costs.

The present chapter discusses the benefits of legal aid to individuals, the criminal justice system and society as a whole. When legal aid is provided, it has direct benefits to individuals and the criminal justice system, through which society as a whole benefits. This in return, amplifies the benefits for individuals and for the criminal justice system, as the public trust in the system grows and as costs reduced by legal aid interventions are directed towards other important public needs. The present chapter also considers some of the major challenges to providing early access to legal aid and suggests how they may be addressed.





The present chapter also considers some of the major challenges to providing early access to legal aid and suggests how they may be addressed.

## B. Benefits of early access for suspects and accused persons

Around the world, millions of people every year have direct experience of criminal justice systems as suspects or accused persons. Many of them will be arrested, lawfully or unlawfully, or otherwise detained by the police or other law enforcement agents and taken to police stations or detention facilities, where they may spend hours, days, months or even years before they are brought before a judge or court who may determine the lawfulness of and necessity for their detention. During this time, those suspected or accused of crime are very vulnerable: they are at the mercy of those who detain them. Police stations and other detention facilities are normally closed to outsiders, with little or no independent oversight of what goes on within their walls. The poor and vulnerable sections of the community are more likely to be subjected to law enforcement action, do not have a “voice”, cannot afford to pay bail bonds or bribes and cannot afford the assistance of a legal aid provider.<sup>45</sup>

In this context, suspects or accused persons who are arrested or detained by the police or other law enforcement agencies can benefit from early access to legal aid in a number of ways, as discussed below.

### Protection against intimidation, ill-treatment and torture

In many countries it cannot be taken for granted that the police or law enforcement agents will act lawfully. Their unlawful conduct is often either “invisible”, or they are given a great deal of latitude by prosecutors, the judiciary and other authorities. Extortion by police officers is endemic in some countries, and may be the prime motive for an arrest.<sup>46</sup> Poor and vulnerable people may be arrested, detained and prosecuted because they cannot afford to pay their way out. Physical abuse, and even torture, of suspects and accused persons is widespread in some countries, and women are especially vulnerable to sexual assault. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment found torture to be widespread in 11 of 15 countries visited between 2005 and 2009,<sup>47</sup> and also noted that the greatest risk of torture and physical ill-treatment occurs during police detention.<sup>48</sup> Most commonly, torture is used to extract information and confessions, but it is also used to intimidate, to extort money, as a means of punishment and to demonstrate authority.<sup>49</sup>

<sup>45</sup>See Open Society Foundations and United Nations Development Programme, *The Socioeconomic Impact of Pretrial Detention*.

<sup>46</sup>*Ibid.*, pp. 18-19.

<sup>47</sup>See country mission reports of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, available from [www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/SRTortureIndex.aspx](http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/SRTortureIndex.aspx). See Birk and others, *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk* (New York, Open Society Foundations, 2011).

<sup>48</sup>The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of the Council of Europe also has reached a similar conclusion. See Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *CPT Standards* (2006), p. 9.

<sup>49</sup>Birk and others, *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk*, p. 30.

The active involvement of legal aid providers at the early stages of the criminal justice process can help to ensure protection against intimidation, ill-treatment and torture. The Special Rapporteur on the independence of judges and lawyers has stated that the presence of a lawyer during interrogation is a key safeguard against ill-treatment,<sup>50</sup> and the Special Rapporteur on the question of torture has recommended that “no statement of confession made by a person deprived of liberty, other than one made in presence of a judge or a lawyer, should have a probative value in court”.<sup>51</sup> In addition, during the universal periodic review process, States regularly recommend that access to legal aid be guaranteed, including for poor and marginalized populations, and that all necessary efforts are taken to prevent torture, excessive use of force, and arbitrary detention and arrest.

### Box 1. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

In the words of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment:

The possibility for persons taken into police custody to have access to a lawyer during [the period immediately following deprivation of liberty] is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill-treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs.<sup>a</sup>

The Committee was specifically referring to protection against torture and ill-treatment, but what it says is equally relevant to other breaches of human rights, such as illegal or arbitrary arrest or detention.

<sup>a</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CPT Standards, p. 9.

### Assuring the right to a fair trial

The right to a fair trial is particularly important in the context of the criminal justice process. Early access to legal aid is a prerequisite for the “real and practical”<sup>52</sup> enjoyment of the right to a fair trial.

Fair trial should be understood both in terms of outcome and process. A fair trial, in the sense of a correct or appropriate determination by a court of whether guilt has been established, will depend, in part, on whether evidence has been obtained (including from the accused) and is presented to a court in a fair, lawful and procedurally correct manner. The involvement of a legal aid provider at the early stages

<sup>50</sup>E/CN.4/1998/39/Add.4, para. 47.

<sup>51</sup>E/CN.4/2003/68, para. 26 (e) and A/56/156, para. 39 (d).

<sup>52</sup>This term is regularly used by the European Court of Human Rights in recognition of the fact that the formal provision of rights, for example, in legislation, is not sufficient to ensure that those rights are enjoyed in practice. See, for example, European Court of Human Rights, *Artico v. Italy* (1981) 3 EHRR 1; *Airey v. Ireland* (1979) 2 EHRR 305; and European Court of Human Rights, *Pishchalnikov v. Russia*, Application No. 7025/04, Judgement of 24 September 2009, para. 66.

of the process can help to ensure that any interrogation of a suspect is conducted properly and lawfully, that potential witnesses and evidence are identified and that relevant lines of inquiry are brought to the attention of the police.

A fair process is important not only in order to ensure the integrity of the evidence that is ultimately put before a court but also because, for a range of reasons, an actual trial may never take place. This may be because a prosecution is not pursued—there may be insufficient evidence of guilt, or the police may never have intended for there to be a prosecution. (As noted earlier, a person may be arrested to extract a bribe, or the police may arrest and detain someone as a way of disciplining or punishing that person.) In many jurisdictions, cases may be disposed of by the imposition of a penalty by the police or by a prosecutor, so that the suspect is punished without ever appearing before a court.<sup>53</sup> Many jurisdictions have procedures for guilty pleas or expedited hearings that mean that the evidence is not fully presented to a court, and there is evidence from a range of jurisdictions that inappropriate pressure may be applied to suspects in order to persuade them to cooperate with such processes.<sup>54</sup> Furthermore, a suspect who is eventually acquitted at a trial or following an appeal after having spent months or years unlawfully or unnecessarily detained will feel that his or her right to a fair trial has not been respected despite the acquittal.

### *Protection of procedural rights*

Associated with the right to a fair trial is a range of procedural rights about which there is a significant level of international agreement. These include:

- Everyone has the right to liberty and security of person; no one shall be subjected to arbitrary arrest or detention; and no one shall be deprived of liberty except on such grounds and in accordance with such procedures as are established by law<sup>55</sup>
- Anyone who is arrested shall be informed, at the time of arrest, of the reasons for the arrest and shall be promptly informed of any charges against him or her<sup>56</sup>

<sup>53</sup>According to data compiled in Germany in 2009, more cases have been finished by “punishing” suspects on the basis of pretrial findings than by taking a decision in a public trial (regardless of whether the accused has ultimately been found guilty). See Germany, Statistisches Bundesamt, *Justiz auf einen Blick* (Wiesbaden, 2011), p. 11. See also Schumann, Bruckmüller and Soyer, *Pre-trial Emergency Defence* (Antwerp, Belgium, Intersentia, 2012), p. 354.

<sup>54</sup>For example, in Georgia 80 per cent of criminal cases are resolved by a “plea agreement”, and there is evidence that police or prosecutors regularly pressure suspects into instructing lawyers to cooperate with a plea agreement. See Cape and Namoradze, *Effective Criminal Defence in Eastern Europe*, p. 170.

<sup>55</sup>International Covenant on Civil and Political Rights, art. 9. Article 7 of the American Convention on Human Rights is almost identical, as is article 6 of the African Charter on Human and Peoples’ Rights and article 14, paragraph 1, of the Arab Charter on Human Rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms, in its article 5, does not contain an express prohibition on arbitrariness, although this is regarded by the European Court of Human Rights as fundamental, but it does set out an exhaustive list of exceptions. Article 5, para. 1 (c), permits deprivation of liberty by lawful arrest or detention for the purposes of bringing the person before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably necessary to prevent the person from committing an offence or fleeing after having done so.

<sup>56</sup>International Covenant on Civil and Political Rights, art. 9, para. 2, and Arab Charter on Human Rights, art. 14, para. 33. Article 5, paragraph 2, of the European Convention for the Protection of Human Rights and Fundamental Freedoms is similar, but in addition requires that the information be given in a language that the person understands. The American Convention on Human Rights, in its article 7, paragraph 4, requires such information to be given to anyone “who is detained”. There is no equivalent provision in the African Charter on Human and Peoples’ Rights.

- Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other judicial officer and shall be entitled to trial within a reasonable time or to release; it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial<sup>57</sup>
- Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law<sup>58</sup>
- In the determination of any criminal charge against him or her, everyone shall be entitled to be tried without undue delay<sup>59</sup>
- In the determination of any criminal charge against him or her, everyone shall be entitled to have adequate time and facilities for the preparation of a defence.<sup>60</sup>

In addition, the International Covenant on Civil and Political Rights provides that, in the determination of any criminal charge, a person is “not to be compelled to testify against himself or to confess to guilt”.<sup>61</sup> A similar formulation is to be found in the American Convention on Human Rights and the Arab Charter on Human Rights.<sup>62</sup>

It cannot be assumed that these procedural rights will be respected, and early access to legal aid provides an important mechanism for seeking to ensure that suspects and accused persons are able to benefit from them.

### Box 2. The interpretation of the right to a fair trial by the European Court of Human Rights

The European Court of Human Rights has held that if national laws attach consequences to what a suspect says or does not say during police interrogation, then the right to a fair trial will normally require that the suspect have the benefit of legal assistance during such interrogation.<sup>a</sup>

<sup>57</sup>International Covenant on Civil and Political Rights, art. 9, para. 3. Similar provisions are found in the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, para. 3; the Arab Charter on Human Rights, art. 14, para. 5; and the American Convention on Human Rights, art. 7, para. 5. The African Charter on Human and Peoples’ Rights, in its article 7, paragraph 1 (*d*), does provide for the right to be tried within a reasonable time before an impartial court or tribunal, but there is no provision regarding prompt production before a judge, nor for release pending trial, although these are provided for by the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2001 (sect. M.1 and M.3 of the African Commission on Human and Peoples’ Rights).

<sup>58</sup>International Covenant on Civil and Political Rights, art. 14, para. 2. See also European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, para. 2; American Convention on Human Rights, art. 8, para. 2; African Charter on Human and Peoples’ Rights, art. 7, para. 1 (*b*); and Arab Charter on Human Rights, art. 16.

<sup>59</sup>International Covenant on Civil and Political Rights, art. 14, para. 3. See also European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, para. 1, which refers to the right to a hearing within a reasonable time, as does the American Convention on Human Rights, art. 8, para. 1, the Arab Charter on Human Rights, art. 14, para. 5, and the African Charter on Human and Peoples’ Rights, art. 7, para. 1 (*d*).

<sup>60</sup>International Covenant on Civil and Political Rights, art. 14, para. 3 (*b*); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, para. 3 (*a*); American Convention on Human Rights, art. 2 (*b*); and Arab Charter on Human Rights, art. 16, para. 2. The African Charter on Human and Peoples’ Rights does not contain a parallel provision, although article 7, paragraph 1 (*c*), does provide for a right to defence, and the right to adequate time and facilities is provided for by the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2001, sect. N.3.

<sup>61</sup>International Covenant on Civil and Political Rights, art. 14, para. 3 (*g*).

<sup>62</sup>American Convention on Human Rights, art. 8, para. 2 (*g*) and para. 3; and Arab Charter on Human Rights, art. 16, para. 6.

While the European Convention for the Protection of Human Rights and Fundamental Freedoms does not include a guarantee that a person shall not be “compelled to testify against him or herself”, the European Court of Human Rights has consistently held that the right not to incriminate oneself and the right to silence are fundamental features of the right to a fair trial, being “generally recognized international standards which lie at the heart of the notion of a fair procedure”.<sup>b</sup>

The European Court of Human Rights, recognizing that suspects are particularly vulnerable during the investigative stage of the criminal justice process, has held that “in most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself”.<sup>c</sup>

<sup>a</sup> See *Salduz v. Turkey* (European Court of Human Rights, Grand Chamber, Application No. 36391/02, Judgement of 27 November 2008), para. 52. See also *Demirkaya v. Turkey* (European Court of Human Rights, Grand Chamber, Application No 31721/02, Judgement of 13 January 2010). In paragraph 17 of that judgement, the Court concluded there that “even though the applicant had the opportunity of being represented by a lawyer during his interrogation by the investigating judge, the absence of a lawyer during his police interrogation irretrievably affected his defence rights as his police statement was used for his conviction”.

<sup>b</sup> See European Court of Human Rights, *Funke v. France*, Application No. 10828/84, Judgement of 25 February 1993, paras. 41-44; European Court of Human Rights, *Saunders v. United Kingdom*, Judgement of 17 December 1996, Reports 1996-VI, para. 68; European Court of Human Rights, *John Murray v. United Kingdom*, Application No. 18731/91, Judgement of 8 February 1996, para. 45; European Court of Human Rights, *Heaney and McGuinness v. Ireland*, Application No. 34720/97, Judgement of 21 December 2000, para. 40; and European Court of Human Rights, *Getiren v. Turkey*, Application No. 10301/03, Judgement of 22 July 2008, para. 123. Note that the European Court of Human Rights has held that the right to remain silent can be restricted, provided that the authorities can demonstrate good cause (*John Murray v. United Kingdom*, para. 47; and *Heaney and McGuinness v. Ireland*, para. 47).

<sup>c</sup> *Salduz v. Turkey* (European Court of Human Rights, Grand Chamber, 27 November 2008, Application No. 36391/02, Judgement of 27 November 2008), para. 54.

### *Avoiding arbitrary and excessive pretrial detention*

The international standard regarding pretrial detention is that it should not be the norm. An accused person who has not been convicted should be detained only if there are reasonable grounds to believe that the person has committed an offence, and that there is a demonstrable risk that he or she will fail to turn up in court, commit a new serious offence or interfere with the course of justice. Furthermore, measures short of detention, such as conditional release, should be applied where appropriate.<sup>63</sup> However, pretrial detention is overused in many countries, and a significant proportion of the estimated 3 million people who are in pretrial detention on any particular day<sup>64</sup> will ultimately be acquitted or be given a non-custodial sentence.

There are a number of causes of the arbitrary and excessive use of pretrial detention, including a lack of clear laws, a failure by judges to devote sufficient time or to apply appropriate criteria to the decision and a failure to provide or consider alternatives. Those accused of crime often lack the education or skills to make an effective application for pretrial release, and are normally ignorant of the legal and factual criteria that courts take into account in making their decisions. Legal aid providers can have a significant impact on pretrial detention decisions, as the following examples show.

<sup>63</sup> See, for example, European Court of Human Rights, *Nevmerzhitsky v. Ukraine*, Application No. 54825/00, Judgement of 5 April 2005; and European Court of Human Rights, *Smirnova v. Russia*, Application Nos. 46133/99 and 48182/99, Judgement of 24 April 2003.

<sup>64</sup> M. Schönreich, “The scale and consequences of pretrial detention around the world”, *Justice Initiatives: Pretrial Detention* (New York, Open Society Institute, 2008), p. 11.

### Box 3. Addressing excessive use of pretrial detention—examples from Bulgaria and Brazil

In Bulgaria, judges routinely ordered defendants to be held in pretrial detention based solely on the seriousness of the alleged offence. This was contrary to the right to liberty under article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Lawyers assisted a large number of applicants in successfully challenging such decisions through the European Court of Human Rights, which led judges to bring their decision-making in line with European standards.<sup>a</sup>

In Brazil, almost half of the prison population is in pretrial detention. In a project on the impact of legal aid on the lives of prisoners held in pretrial detention in the city of Rio de Janeiro, it was found that two thirds were held illegally. Almost one third of those in pretrial detention who received assistance from project lawyers were released within 20 days, compared with less than 14 per cent of those who did not receive legal assistance.<sup>b</sup>

<sup>a</sup> Cape and Namoradze, *Effective Criminal Defence in Eastern Europe*, p. 135.

<sup>b</sup> Open Society Foundations, "The impact of legal aid on the lives of pre-trial prisoners: an experiment in the city of Rio de Janeiro", final report (August 2011).

### *Ensuring lawful and appropriate treatment*

Not all breaches of the law by the police or law enforcement agents amount to a breach of human rights, nor do they necessarily interfere with the right to a fair trial. Nevertheless, they may have a severely detrimental impact on, and consequences for, suspects and accused persons. What is unlawful depends, of course, on national laws and the regulation of police powers. Suspects' rights also vary significantly among jurisdictions. At the early stages of the criminal justice process, national laws may regulate a wide range of processes and actions, including:

- Arrest
- Notification of detention to third parties
- Notification of rights
- Information and disclosure of evidence
- Interrogation
- Conditions of detention
- Length of detention
- Decisions regarding pretrial detention
- Production before a judge or court
- Special rules relating to children and other persons belonging to groups with special needs.

Suspects and accused persons are likely to be unaware of such laws and regulations. Even if they are aware, they are not in a position to effectively deal with any breach. If legal aid providers are involved at the early stages of the criminal justice process, the police are more likely to comply with their legal obligations. In the event of a breach, legal aid providers can use a range of strategies to try to ensure compliance.



Depending on the nature and seriousness of the breach and the reasons for it, they may bring the breach to the attention of the police and, given their status, the police are more likely to take notice than if the breach is brought to their attention by the suspect himself or herself. Alternatively, the legal aid provider may bring it to the attention of a prosecutor, judge or court, either in the course of criminal proceedings (for example, at a pretrial detention hearing) or by issuing court proceedings for habeas corpus<sup>65</sup> (where relevant) or some other civil action. Action taken by a legal aid provider may not be successful, but in many cases success is more likely than if a suspect or accused person alone takes action.

Legal aid providers can play an important role in seeking to ensure that the police, prosecutors and judges deal with suspects and accused persons in an appropriate manner and make appropriate decisions. The police, prosecutors and judges make a range of discretionary decisions—about interrogation, investigation, prosecution, out-of-court disposals, expedited procedures and pretrial detention—in respect of which the quality of the decision depends upon the information available and consideration of legally relevant (and only legally relevant) criteria. Legal aid providers can play an important role in ensuring that decision makers are in possession of relevant information and are aware of, and take into account, the relevant law.

In many countries, procedures—such as for guilty pleas or plea agreements—have been introduced in order to make the criminal justice process more efficient. Such a procedure may benefit victims by avoiding the need for them to give evidence at trial. Legal aid providers can advise suspects on their legal position, and on whether it is appropriate to cooperate with such a procedure, or they can even suggest to the police or prosecutor that such a procedure be adopted. In some countries, it is recognized that, for a range of reasons, including inappropriate pressure applied by the police, suspects may agree to such a procedure even though it is not appropriate or in their interests. These countries have therefore made the procedure conditional on the suspect having received legal assistance.<sup>66</sup> In this way, early access to legal aid can benefit both individuals and the criminal justice system.

### Assisting suspects to understand and navigate the criminal justice process

Arrest and detention on suspicion of having committed a criminal offence can be a daunting or frightening experience even for those who are familiar with criminal justice processes or who have previously been arrested or detained. The suspect is removed from familiar surroundings, is relatively powerless, may be detained in insanitary and overcrowded conditions and may not know about or understand the processes and procedures to which he or she is to be subjected. In particular, the suspect is unlikely to know the law concerning the offence(s) for which he or she has been arrested, what to do if and when he or she is interviewed, and how long he or she is likely to be detained. Furthermore, in some countries a significant proportion of suspects and accused persons do not speak or understand the language used in criminal proceedings.

<sup>65</sup>A form of legal action, recognized in many countries, for testing the legality of a person's detention. In some countries, an alternative term is used, such as *amparo de libertad*.

<sup>66</sup>In Georgia, for example, legal assistance is mandatory if a plea agreement is to take effect. See Cape and Namoradze, *Effective Criminal Defence in Eastern Europe*, p. 168.

These difficulties are compounded if the suspect or accused person is a child, is vulnerable through alcohol or drug abuse, or is psychologically vulnerable. Evidence suggests that, regardless of the level of development of a particular country, those who are arrested or detained are disproportionately likely to be from vulnerable or disadvantaged groups.

**Box 4. Vulnerabilities of prison populations—examples from Sierra Leone, Nepal, India and Canada**

In a survey conducted in Sierra Leone, where English is the official language, none of those surveyed had English as a first language and only five per cent had English as a second language.<sup>a</sup>

A study of six African countries found that “[t]he majority of those in prison come from very poor backgrounds, often having received little education”.<sup>b</sup>

In Nepal, a study by the non-governmental organization (NGO) Advocacy Forum conducted in 2009 found that more than 65 per cent of persons interviewed in police detention centres were from ethnic minorities or were Dalits.

In India, a study estimated that 80 per cent of those in prison had only a primary school education or were illiterate.<sup>c</sup>

A study for the Department of Justice of Canada found that at least two thirds of the federal prison population suffered from substance abuse, and that around one fifth suffered from mental disorder or were otherwise mentally vulnerable.<sup>d</sup>

<sup>a</sup> Timap for Justice and Prison Watch Sierra Leone, *The Socioeconomic Impact of Pretrial Detention in Sierra Leone* (New York, Open Society Foundations, 2013).

<sup>b</sup> Penal Reform International, “Prison conditions in Africa” (London, Penal Reform International and African Centre for Democracy and Human Rights, 1993).

<sup>c</sup> See Open Society Foundations and United Nations Development Programme, *The Socioeconomic Impact of Pretrial Detention*, p. 23.

<sup>d</sup> S. Verdun-Jones and A. Tijerino, *A Review of Brydges: Duty Counsel Services in Canada* (Canada: Department of Justice, undated), chap. 4.

Although most of the evidence cited above concerns prison inmate populations, the same profile is likely to be found among those in custody in the early stages of the criminal justice process. Legal aid providers can help to reduce the vulnerability of suspects and detainees by, for example:

- Seeking to ensure that they understand why they have been arrested or detained
- Informing them of relevant laws
- Advising them on how to deal with interrogation and, if appropriate, whether to admit guilt
- Contacting family members, employers and potential sureties (persons who know the accused and who are willing to act as a guarantor that the accused will attend court by depositing a sum of money with the court)
- Ensuring that decisions made by the suspect or detainee are respected.



Accused persons appearing in court, for example, at a pretrial detention hearing, are more likely to understand what is happening if they are represented.<sup>67</sup> Legal aid providers can also safeguard vulnerable suspects and detainees by ensuring that their vulnerabilities are identified and that appropriate provision is made for such vulnerabilities. This is particularly important since evidence demonstrates that the police often fail to identify vulnerabilities.<sup>68</sup>

### Protecting persons with special needs

The United Nations Principles and Guidelines provide that special measures should be taken to ensure that meaningful access to legal aid is provided for persons with special needs. In addition to the broad coverage of principle 10, the United Nations Principles and Guidelines indicate the specific steps States should take to protect the rights and well-being of particular groups.

#### United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>

##### Principle 10. Equity in access to legal aid

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.

<sup>a</sup> General Assembly resolution 67/187, annex, para. 32.

### Women

Women in many countries face structural and cultural barriers to accessing legal aid, having inadequate knowledge of their rights, lacking the resources to find out what their rights are and facing significant obstacles in exercising them.<sup>69</sup> Those who are victims of domestic violence are sometimes treated as suspects or accused in criminal proceedings,<sup>70</sup> and those who have been subjected to trafficking in human beings may be arrested or detained on suspicion of having committed a crime. Furthermore, in some countries women who have been arrested or detained are at risk of sexual and other forms of violence from State officials.

<sup>67</sup>V. Kemp, *Transforming Legal Aid: Access to Criminal Defence Services* (London, Legal Services Research Centre, 2010), p. 79.

<sup>68</sup>For example, studies in England and Wales have shown that “mentally disordered offenders in police stations are rarely identified or afforded treatment”. See T. Nemitz and P. Bean, “Protecting the rights of the mentally disordered in police stations: The use of the appropriate adult in England and Wales”, *International Journal of Law and Psychiatry*, vol. 24, No. 6 (2001), p. 604.

<sup>69</sup>Penal Reform International, “Briefing on the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems” (2013). Available from [www.penalreform.org/wp-content/uploads/2013/05/PRI-Briefing-on-Legal-Aid-Guidelines-and-Principles-April-20131.pdf](http://www.penalreform.org/wp-content/uploads/2013/05/PRI-Briefing-on-Legal-Aid-Guidelines-and-Principles-April-20131.pdf).

<sup>70</sup>For example, if they retract allegations of violence or if they refuse to give evidence against their abuser.

The United Nations Principles and Guidelines require special measures to be taken to ensure meaningful, gender-sensitive access to legal aid for women.

### United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>

#### Guideline 9. Implementation of the right of women to access legal aid

States should take applicable and appropriate measures to ensure the right of women to access legal aid, including:

- (a) Introducing an active policy of incorporating a gender perspective into all policies, laws, procedures, programmes and practices relating to legal aid to ensure gender equality and equal and fair access to justice;
- (b) Taking active steps to ensure that, where possible, female lawyers are available to represent female defendants, accused and victims;
- (c) Providing legal aid, advice and court support services in all legal proceedings to female victims of violence in order to ensure access to justice and avoid secondary victimization and other such services, which may include the translation of legal documents where requested or required.

<sup>a</sup> General Assembly resolution 67/187, annex, para. 52.

The United Nations Principles and Guidelines build on a range of United Nations instruments that deal with the needs of women in the criminal justice system. While some, such as the updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, are principally concerned with the needs of women as victims of crimes of violence,<sup>71</sup> others, such as the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules),<sup>72</sup> require that the distinctive needs of women prisoners be adequately catered for. Thus, rule 2 of the Bangkok Rules states that adequate attention must be paid to the admission procedures for women, and that newly arrived women prisoners should, among other things, be provided with facilities to contact their relatives and access to legal advice.

Legal aid providers can contribute to ensuring that the distinctive needs of women are met by seeking to ensure that the policies and procedures of criminal justice agencies are compliant with the relevant normative instruments. This may include trying to ensure, where appropriate, that female clients are interviewed by female officers, that they are detained separately from males and that detention officers are female.<sup>73</sup> In circumstances in which a legal aid means test is applied, legal aid providers can help to ensure that, when individual family members are in conflict with each other, only the income of the woman is used for the purposes of the means test.<sup>74</sup>

<sup>71</sup> General Assembly resolution 65/228, annex.

<sup>72</sup> General Assembly resolution 65/229, annex. See Penal Reform International “Briefing on the United Nations rules for the treatment of women prisoners and non-custodial measures for women offenders (‘Bangkok rules’)” (2011). Available from [www.quno.org/geneva/pdf/humanrights/women-in-prison/PRI-QUNO\\_English.pdf](http://www.quno.org/geneva/pdf/humanrights/women-in-prison/PRI-QUNO_English.pdf).

<sup>73</sup> See Association for the Prevention of Torture and Penal Reform International, “Women in detention: a guide to gender-sensitive monitoring” (London, Penal Reform International, 2013), p. 9.

<sup>74</sup> United Nations Principles and Guidelines, para. 41 (f) (guideline 1).

Legal aid service providers should consider how to structure their services so that female legal aid providers are available to advise, assist and represent female suspects and accused persons. In some circumstances, the legal aid service may be dedicated to providing services for women.

### *Children*

Children are particularly at risk when they are treated as being in conflict with the law. Not only are they less equipped, because of their age and levels of understanding, to deal with the consequences of arrest and detention, but they are also at risk of ill-treatment. According to a joint report of the Office of the United Nations High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system,<sup>75</sup> children in contact with the criminal justice system may be exposed to high levels of violence: “Police and other security forces are often responsible for violence against children, and arrests are one of the situations in which this occurs ... children are at high risk of violence from their first point of contact with the law”.<sup>76</sup>

Reflecting these international norms and concerns, the United Nations Principles and Guidelines address the needs of children specifically, indicating that: children should have access to legal aid under the same or more generous conditions as adults; legal aid for children should be accessible, age-appropriate and responsive to the specific legal and social needs of children; and special measures should be adopted for children to promote effective access to justice and to prevent the adverse effects of being involved in the criminal justice system.

#### **United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>**

##### **Principle 3. Legal aid for persons suspected of or charged with a criminal offence**

Children should have access to legal aid under the same conditions as or more lenient conditions than adults.

##### **Principle 11. Legal aid in the best interests of the child**

In all legal aid decisions affecting children, the best interests of the child should be the primary consideration.

Legal aid provided to children should be prioritized, in the best interests of the child, and be accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children.

<sup>75</sup>A/HRC/21/25.

<sup>76</sup>Ibid., para. 21.

**United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>**  
(continued)

**Guideline 10. Special measures for children**

States should ensure special measures for children to promote children's effective access to justice and to prevent stigmatization and other adverse effects as a result of their being involved in the criminal justice system, including:

(a) Ensuring the right of the child to have counsel assigned to represent the child in his or her own name in proceedings where there is or could be a conflict of interest between the child and his or her parents or other parties involved;

(b) Enabling children who are detained, arrested, suspected or accused of, or charged with a criminal offence to contact their parents or guardians at once and prohibiting any interviewing of a child in the absence of his or her lawyer or other legal aid provider, and parent or guardian when available, in the best interests of the child;

(c) Ensuring the right of the child to have the matter determined in the presence of the child's parents or legal guardian, unless it is not considered to be in the best interests of the child;

(d) Ensuring that children may consult freely and in full confidentiality with parents and/or guardians and legal representatives;

(e) Providing information on legal rights in a manner appropriate for the child's age and maturity, in a language that the child can understand and in a manner that is gender- and culture-sensitive. Provision of information to parents, guardians or caregivers should be in addition, and not an alternative, to communicating information to the child;

(f) Promoting, where appropriate, diversion from the formal criminal justice system and ensuring that children have the right to legal aid at every stage of the process where diversion is applied;

(g) Encouraging, where appropriate, the use of alternative measures and sanctions to deprivation of liberty and ensuring that children have the right to legal aid so that deprivation of liberty is a measure of last resort and for the shortest appropriate period of time;

(h) Establishing measures to ensure that judicial and administrative proceedings are conducted in an atmosphere and manner that allow children to be heard either directly or through a representative or an appropriate body in a manner consistent with the procedural rules of national law. Taking into account the child's age and maturity may also require modified judicial and administrative procedures and practices.

<sup>a</sup> General Assembly resolution 67/187, annex, paras. 22, 33-34 and 53.

Guideline 10 is primarily concerned with the treatment of children who are in conflict with the law, but it is important to note that a range of United Nations instruments also provide for special protection to be given to child victims and witnesses.<sup>77</sup>

<sup>77</sup>See Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, especially guidelines 19, 21, 22 and 24 (Economic and Social Council resolution 2005/20, annex); the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, para. 6 (General Assembly resolution 40/34, annex); and the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, principles 4 and 11, and guideline 7.

The United Nations Principles and Guidelines build upon previous United Nations instruments. The Convention on the Rights of the Child, in its article 3, defines a “child” as including any person under the age of 18 years, and requires that public institutions and courts give primary consideration to the best interests of the child. Arrest and detention of a child must be used only as a measure of last resort and for the shortest appropriate time. If a child is deprived of his or her liberty, he or she must be separated from adults (unless it is considered in the child’s best interests not to be) and must be allowed to have contact with his or her family. A child has the right to be treated in a manner which takes into account the needs of a person of his or her age; the right to prompt access to legal and other appropriate assistance;<sup>78</sup> the right to challenge the legality of the deprivation of their liberty before a court or other competent, independent, and impartial authority; and the right to a prompt decision on any such action (art. 37). Furthermore, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) provide that, where appropriate, consideration must be given to dealing with children in conflict with the law without resorting to formal trial. The police, prosecutors and others should have the discretion to dispose of cases involving children without recourse to formal proceedings.<sup>79</sup> In the context of the age of criminal responsibility, the Committee on the Rights of the Child has stated that “If there is no proof of age, the child is entitled to a reliable medical or social investigation that may establish his/her age and, in the case of conflict or inconclusive evidence, the child shall have the right to the rule of the benefit of the doubt”.<sup>80</sup>

Legal aid providers have a significant role to play in ensuring that children are appropriately dealt with in accordance with the principles and processes described above. Indeed, legal aid providers can help to ensure that, from the outset, suspects and accused persons who are children are correctly identified as such, as the following example demonstrates.

#### **Box 5. Determining the age of young suspects in Malawi**

Previously, determining the age of children who came into contact with the criminal justice system in Malawi was often difficult because of the absence of a birth certificate. Paralegals employed by the Paralegal Advisory Service were able to work with the police and other agencies to devise mechanisms for screening young people—in terms of their family circumstances, the alleged offence and other factors—with a view, where appropriate, to diverting them from the criminal justice system. As a result, in 2004 paralegals in Malawi were instrumental in diverting 77 per cent of children who came into contact with the law from the criminal justice system.<sup>a</sup>

<sup>a</sup> United Nations Office on Drugs and Crime, *Handbook on Improving Access to Legal Aid in Africa*, p. 50.

In some countries, specialist organizations, using legal aid providers and other professionals, deliver services to children that are designed to meet their particular needs.

<sup>78</sup>Article 37 (d) of the Convention on the Rights of the Child states that every child deprived of his or her liberty has the right to prompt access to legal and other appropriate assistance.

<sup>79</sup>General Assembly resolution 40/33, annex, rules 11.1 and 11.2.

<sup>80</sup>Committee on the Rights of the Child, General Comment No. 10 on children’s rights in juvenile justice (CRC/C/GC/10), para. 39.

### Box 6. Examples of legal assistance for women and children—examples from Zimbabwe and Sudan

In Zimbabwe, following a Government review which found that almost no children who received a custodial sentence had been represented by a lawyer, the Care at the Core of Humanity (CATCH) Trust established a dedicated service to provide legal assistance to children in conflict with the law.

CATCH receives referrals from some police stations and from prosecutors. A CATCH legal officer makes contact with the child as soon as possible and no more than 24 hours after receiving a referral. The services provided include assistance with bail applications, development of a case plan in conjunction with a social services officer, negotiation of diversion from the criminal justice system and, if necessary, referral to a lawyer. In 2011, 110 children were assisted; this is projected to increase to 540 in 2013. The cost works out to about \$260 per child.

In Sudan, the Sudanese authorities, with the support of the United Nations Children's Fund (UNICEF), piloted a family and child protection unit, which provided legal and other services to female and child victims, witnesses and accused persons.<sup>a</sup>

<sup>a</sup> United Nations Office on Drugs and Crime, *Handbook on Improving Access to Legal Aid in Africa*, Criminal Justice Handbook Series (Vienna, 2011), p. 80.

### Other persons with special needs

States should ensure that legal aid is provided to persons living in rural, remote and economically and socially deprived areas, and to persons who are members of economically and socially disadvantaged groups. The United Nations Principles and Guidelines specify that States should take into account the needs of such persons and groups in the design of national legal aid schemes, including early access schemes.

#### United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>

##### Guideline 11. Nationwide legal aid system

In the design of their nationwide legal aid schemes, States should take into account the needs of specific groups, including but not limited to the elderly, minorities, persons with disabilities, the mentally ill, persons living with HIV and other severe contagious diseases, drug users, indigenous and aboriginal people, stateless persons, asylum seekers, foreign citizens, refugees and internally displaced persons, in line with guidelines 9 and 10.

<sup>a</sup> General Assembly resolution 67/187, annex, para. 57.

In respect of suspects and accused persons who have particular health needs, the Basic Principles for the Treatment of Prisoners provide that all persons in detention have the right to the same “health services available in the country without discrimination on the grounds of their legal situation”.<sup>81</sup> Evidence suggests that even these rights and obligation are often disregarded or ignored. In many countries, police stations and pretrial detention facilities are not designed or equipped for lengthy detention: they are often overcrowded and unsanitary, and lack basic facilities.

<sup>81</sup> General Assembly resolution 45/111, annex.

Detaining those who are healthy together with, for example, persons who are HIV-positive or who have tuberculosis results in a “mixing bowl” effect, which contributes to the spread of HIV/AIDS and other infectious diseases and places those detained, and those detaining them, at risk.<sup>82</sup> Persons who are suffering from mental illness, or who are otherwise mentally vulnerable, are at risk of their conditions being exacerbated by detention.<sup>83</sup>

**Box 7. The “mixing bowl” effect in South Africa**

“Every day, between 200 and 300 new awaiting-trial prisoners are admitted to the Pollsmoor Correctional Services Centre in the Western Cape. Between 350 and 400 cases go to court each day, and about 20 detainees are released or remanded on bail. Pollsmoor accommodates more than twice the number of prisoners it was designed for. Overcrowding is at 263 per cent, mostly because of awaiting-trial detainees. TB is an airborne disease, so overcrowding contributes to its spread. And the daily release of prisoners on bail or because they have completed their sentences means that TB does not stay behind bars. The health of the prison population cannot be separated from that of the public and should be of concern”.<sup>a</sup>

<sup>a</sup> H. Hausler, “Tuberculosis cannot be kept behind bars”, *Mail and Guardian* (Johannesburg), 22 March 2013. For further examples of the adverse health and other consequences of pretrial detention, see Csete and van Zyl Smit, *Pretrial Detention and Health: Unintended Consequences, Deadly Results*.

Police officers and detention officials often lack the knowledge, skills, resources and incentives to identify vulnerable suspects and accused persons. For example, people with infectious diseases or those who are psychologically vulnerable may require specialized medical attention. Specific legal knowledge as well as resources such as interpretation may be required for refugees or asylum seekers or for people from remote and rural areas. There may also be other systemic or resource-based disincentives which inhibit the capacity of the police or detention officials from doing so and providing the necessary assistance.

Legal aid providers, whose focus and professional obligations are directed towards the individual suspect or accused person, are well placed to identify persons who have special needs. Furthermore, given their status and legal knowledge and expertise, they are able to determine what special measures may be appropriate and/or are available, and to seek to ensure that appropriate measures are taken. In so doing, legal aid providers can play a significant role in protecting disadvantaged people who are arrested or detained. In the process, they also support the State in complying with international and national obligations.

<sup>82</sup>D. Wolfe, “Policy reform is the key to harm reduction”, *Harm Reduction News*, vol. 5, No. 3 (2004); D. Rose and T. Clear, “Incarceration, re-entry, and social capital: social networks in the balance”, in *Prisoners Once Removed: The Impact of Incarceration and Re-entry on Children, Families, and Communities*, J. Travis and M. Waul, eds. (Washington, D.C., Urban Institute, 2003).

<sup>83</sup>See, generally, Csete and van Zyl Smit, *Pretrial Detention and Health: Unintended Consequences, Deadly Results*.



### C. The wider benefits of early access to legal aid

Early access to legal aid not only benefits the individual suspects and accused persons who receive advice and assistance from a legal aid provider, but also is of wider benefit to communities and to States. The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa noted that prolonged incarceration of suspects and prisoners without providing access to legal aid or the courts violated basic principles of international law and human rights, and summarized the wider benefits of legal aid as follows:

Legal aid to suspects and prisoners has the potential to reduce the length of time suspects are held in police stations, congestion in the courts, and prison populations, thereby improving conditions of confinement and reducing the costs of criminal justice administration and incarceration.

These and other benefits are considered in the present section.

#### Ensuring fair, efficient and effective criminal justice systems

The United Nations Principles and Guidelines are founded on the idea that access to legal aid is an essential element of a fair, humane and efficient criminal justice system, and thus of the rule of law. In addition to helping to produce just outcomes in individual cases, access to legal aid improves the transparency of criminal justice processes and the accountability of criminal justice institutions. This contributes to an increase in trust of and confidence in the criminal justice system, which in turn is likely to have a positive impact on respect for the law.<sup>84</sup>

#### Box 8. Justice as a precondition for effective crime control—European Social Survey

The European Social Survey concluded:

There is always an undercurrent in debates about criminal policy that suggests fairness and due process are constraints on effective crime control, and even that an emphasis on due process is therefore unwelcome. Yet our initial analysis of the European Social Survey suggests quite the reverse. Justice is a precondition for effective crime control across Europe, and policy-makers and practitioners need to focus on ensuring that the police and justice system operate in ways that are genuinely fair, just and respectful of people's rights.<sup>a</sup>

<sup>a</sup>J. Jackson and others, "Trust in justice: topline results from round 5 of the European Social Survey", ESS Topline Results Series, No. 1, 2011. Available from [www.europeansocialsurvey.org](http://www.europeansocialsurvey.org).

#### *Providing information to the police, prosecutors and the courts*

In many countries, the police, prosecutors and the courts are under-resourced and under-trained, and face large, and sometimes insurmountable, caseloads. In order to make timely, appropriate decisions, they require access to a wide range of information that is often not readily available, including:

<sup>84</sup>Tyler, *Why People Obey the Law*.



- Information about the suspected offence
- Information from and concerning the suspect or accused person
- Information about relevant law and policies
- Information about relevant facilities.

Legal aid providers can assist in obtaining and interpreting such information and in making it available in a usable form. They can trace witnesses, secure the attendance of a parent or guardian of a child suspect or accused, and identify sureties, in order to assist in decisions about pretrial detention.

An example of this is the contribution that legal aid providers can make to decisions regarding pretrial detention. Globally, nearly one third of people in prison are in pretrial detention, and the proportion is much higher in some regions and in some countries.<sup>85</sup> Overcrowding of detention facilities and prisons is endemic in many regions and countries, and has significant adverse consequences, which are well recognized and documented. They include cramped and unhygienic accommodation, lack of privacy, ill health, the spread of infectious diseases, increased tension and increased levels of violence, both among prisoners and between prisoners and staff.<sup>86</sup> In helping to ensure that appropriate decisions are made concerning pretrial detention, guilt or innocence, and case disposal, access to legal aid at the early stages of the criminal justice process can reduce prison populations, including those in pretrial detention, and thus help reduce the serious problems caused by overcrowding.

An example of the positive impact on pretrial detention of early access to legal aid providers is provided by a duty lawyer scheme in Nigeria.

**Box 9. Impact of early access to legal aid on pretrial detention—example from Nigeria**

In 2005, under an agreement between the National Police Force, the Legal Aid Council and the Justice Initiative, a police-duty solicitor scheme was established in the major police precincts of Nigeria. Under the scheme, duty solicitors attended designated police stations on a 24-hour duty schedule, and the police ensured that suspects were given access to them. The duty solicitors advised suspects and detainees, and advocated on their behalf, applied for bail or discharge from detention and made applications under the Fundamental Human Rights (Enforcement Procedure) Rules. At the end of the first eight months, scheme lawyers had secured the release of 611 detainees from prison custody and 644 persons from police custody. The average period in detention had been reduced from 609 days to 171 days.

<sup>a</sup> A. Nwapa, "Building and sustaining change: pretrial detention reform in Nigeria", *Justice Initiatives: Pretrial Detention* (New York, Open Society Institute, 2008).

<sup>85</sup> Schönteich, "The scale and consequences of pretrial detention around the world". See also International Centre for Prison Studies, World Prison Brief database, available from [www.prisonstudies.org/publications/list.html](http://www.prisonstudies.org/publications/list.html).

<sup>86</sup> Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *7th General Report on the CPT's Activities Covering the Period 1 January to 31 December 1996*, document CPT/Inf (97) 10 (22 August 1997), para. 13. Available from [www.cpt.coe.int/en/annual/rep-07.htm](http://www.cpt.coe.int/en/annual/rep-07.htm). See also Csete and van Zyl Smit, *Pretrial Detention and Health: Unintended Consequences, Deadly Results*.

### *Ensuring that court hearings are effective*

Court hearings, even at the early stages of the criminal justice process, require effective coordination of a range of actors: police, detention officers, prosecutors, judges, witnesses and sureties. In many countries, they are often ineffective because one or more crucial participants is missing. Legal aid providers have a particular interest, on behalf of their clients, in making sure that court hearings, such as pretrial detention hearings, go ahead. They can therefore assist in ensuring that the appropriate people attend court at the right time and that necessary information is available to the court. The court hearing itself may be ineffective, or take longer, if the accused does not understand the process or is not in a position to make an effective contribution to the proceedings, for example, by explaining his or her circumstances for the purposes of a pretrial detention decision or, if appropriate, by indicating his or her guilt. A legal aid provider can explain the procedure to the client in advance of the hearing, advise him or her about appropriate applications and pleas and, if necessary, ensure that the client understands what is said and what decisions have been made.

#### **Box 10. Legal aid and guilty pleas in Malawi**

One example of the impact that early access to legal aid can have on assisting with effective court hearings comes from Malawi. In a project carried out by the Paralegal Advisory Service in Malawi with pretrial detainees, it was found that the detainees who received legal advice were more likely to enter informed pleas to the charges against them, saving considerable time and expense. Thirty-three people detained on homicide charges indicated to paralegals from the Service that they were ready to plead guilty to manslaughter, and were then referred for advice to a lawyer. After receiving the advice, 29 of them entered guilty pleas and were sentenced. It was calculated that this resulted in savings for the judiciary alone of \$33,000.<sup>a</sup>

In this scheme, legal advice was provided to people who were already in pretrial detention. Had there been a scheme to provide such advice prior to the decision on pretrial detention, the financial savings could have been even greater.

<sup>a</sup> C. Msiska, "On the front lines: insights from Malawi's Paralegal Advisory Service", *Justice Initiatives: Pretrial Detention* (New York: Open Society Institute, 2008), pp. 91 and 95.

### *Improving procedures*

Although reference is often made to criminal justice "systems", the reality in many countries is that the constituent elements of the "system"—police, prosecutors, judges, detention facilities and prisons—do not communicate well with each other and have different, and often conflicting, needs, resources, objectives, incentives and cultures. They are also often burdened by bureaucratic adherence to rules and procedures that do not promote the efficient processing of criminal cases. Legal aid providers, as relative outsiders with an obligation to pursue the best interests of their clients, are well placed to identify systemic problems and to identify the sources of and solutions to those problems. They also have a status that allows them, acting either alone or in combination, to make a positive contribution to improving criminal justice processes, rendering them more effective and efficient. This may be achieved by conducting strategic litigation, but often this is a last resort. Significant improvements can be promoted by legal aid providers working with criminal justice agencies at the national and local levels.

**Box 11. Facilitating improvement in procedures—examples from Nigeria and Malawi**

The Nigerian Legal Aid Council and the Open Society Justice Initiative helped to develop a case-file management system for use by criminal justice agencies. This enabled the agencies to ensure the smooth processing of cases and facilitated the implementation of a practice direction by the senior judiciary requiring periodic review of cases involving persons kept in pretrial detention.

In Malawi, paralegals from the Paralegal Advisory Service designed a bail application form and provided training on its use. They also worked with the police to enable minor cases to be dealt with more quickly.<sup>a</sup>

<sup>a</sup> Msiska, “On the front lines: insights from Malawi’s Paralegal Advisory Service”, pp. 75, 76 and 78.

***Making criminal justice agencies accountable***

Through their involvement in individual cases, legal aid providers can play an important role in holding the police and other criminal justice agencies to account, using legal and other mechanisms to ensure that such agencies act in a lawful manner. This will have an impact not only on individual cases, but also on the conduct of the agency more generally. In the UNODC *Handbook on Police Accountability, Oversight and Integrity*, lawyers and legal aid groups are identified as key actors in using civil litigation to hold the police accountable, and to correct any misconduct by them.<sup>87</sup>

***Educating the community***

Legal aid providers, especially those working for legal aid service providers that are publicly funded or NGOs, can go beyond individual advice or advocacy and engage in educating suspects and detainees, and the wider community, about their legal rights. In the case of the former, this may enable them to prepare their own cases and represent themselves before courts, especially in less serious cases or if there is a shortage of trained lawyers or legal personnel. With regard to communities, education campaigns can enable people to understand how criminal justice processes operate and can equip them to cope more effectively if they are arrested or detained.

**Box 12. Community education—examples from South Africa and Sierra Leone**

In South Africa, the Street Law scheme trains senior law students to teach high school pupils, those awaiting trial, juvenile prisoners and community groups about the law in general and the criminal justice system in particular.

In Sierra Leone, Advocaid and the Sierra Leone Court Monitoring Programme, with the support of the Special Court for Sierra Leone, prepared a booklet entitled, “After you’ve been arrested: what next”. The booklet contains photographs and visual aids in the Krio language and is designed to help explain the criminal justice process to persons who have been arrested so that they can understand their rights and pass on their knowledge to others.

<sup>87</sup> See, for example, *Handbook on Effective Police Responses to Violence against Women*, Criminal Justice Handbook Series (United Nations publication, Sales No. E.10.IV.3), chap. I.

### *Improving the treatment and experiences of victims and witnesses*

It is commonly recognized that victims of and witnesses to crime, especially those from marginalized groups, such as women who are victims of violence, often encounter particular difficulties in respect of criminal justice processes. Such difficulties include cultural attitudes or traditional practices which may condone what are, in effect, criminal offences against persons from particular groups (for example, female genital mutilation, other forms of violence and trafficking in human beings), failure to investigate alleged crimes reported by people from such groups and barriers to providing or giving evidence against alleged perpetrators.<sup>88</sup> Some States have well-developed systems and procedures for responding to and protecting the victims of and witnesses to such crimes. Others are actively working towards fully developed systems by prioritizing the establishment of victim and witness support systems, the training of criminal justice system officials regarding the rights of victims and witnesses, and awareness-raising among citizens.<sup>89</sup> However, many States either do not recognize the special needs of such victims and witnesses or have not developed an effective response within the criminal justice system.<sup>90</sup>

In some jurisdictions, the police and other law enforcement agents, whether intentionally or not, avoid respecting the right to legal aid by treating de facto suspects as witnesses.<sup>91</sup> For the right to legal aid to be effective, either witnesses should have the same right to legal aid as suspects or accused persons in domestic law, or regulations and/or procedures (enforced as appropriate by the judiciary) should make clear that the right to legal aid for suspects is not to be undermined by treating them as witnesses.<sup>92</sup>

The United Nations Principles and Guidelines make special reference to legal aid for victims of crime and for witnesses. Without prejudice to or inconsistency with the rights of the accused, States should, where appropriate, provide legal aid to victims of and witnesses to crime, recognizing their particular interests and vulnerabilities.

#### **United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>**

##### **Principle 4. Legal aid for victims of crime**

Without prejudice to or inconsistency with the rights of the accused, States should, where appropriate, provide legal aid to victims of crime.

<sup>88</sup> See, for example, *Handbook on Effective Police Responses to Violence against Women*, Criminal Justice Handbook Series (United Nations publication, Sales No. E.10.IV.3), chap. I.

<sup>89</sup> See, for example, the joint statement of 28 November 2012 of the representatives of Albania, Bosnia and Herzegovina, Croatia, Montenegro, the former Yugoslav Republic of Macedonia, Turkey and Ukraine. Available at [www.mprh.hr/lgs.axd?t=16&id=3463](http://www.mprh.hr/lgs.axd?t=16&id=3463).

<sup>90</sup> See, in relation to violence against women, *Handbook on Effective Police Responses to Violence against Women*, pp. 18-23.

<sup>91</sup> See, for example, Cape and others, *Effective Criminal Defence in Europe*, p. 585, and Cape and Namoradze, *Effective Criminal Defence in Eastern Europe*, p. 447.

<sup>92</sup> For example, in European Court of Human Rights, *Brusco v. France*, Application No. 1466/07, Judgement of 14 October 2012, the Court held that the right to consult a lawyer applies to a person held in police custody as a witness.

### Guideline 7. Legal aid for victims

Without prejudice to or inconsistency with the rights of the accused and consistent with the relevant national legislation, States should take adequate measures, where appropriate, to ensure that:

- (a) Appropriate advice, assistance, care, facilities and support are provided to victims of crime, throughout the criminal justice process, in a manner that prevents repeat victimization and secondary victimization;
- (b) Child victims receive legal assistance as required, in line with the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime;
- (c) Victims receive legal advice on any aspect of their involvement in the criminal justice process, including the possibility of taking civil action or making a claim for compensation in separate legal proceedings, whichever is consistent with the relevant national legislation;
- (d) Victims are promptly informed by the police and other front-line responders (i.e. health, social and child welfare providers) of their right to information and their entitlement to legal aid, assistance and protection and of how to access such rights;
- (e) The views and concerns of victims are presented and considered at appropriate stages of the criminal justice process where their personal interests are affected or where the interests of justice so require;
- (f) Victim services agencies and non-governmental organizations can provide legal aid to victims;
- (g) Mechanisms and procedures are established to ensure close cooperation and appropriate referral systems between legal aid providers and other professionals (i.e. health, social and child welfare providers) to obtain a comprehensive understanding of the victim, as well as an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation and needs.

<sup>a</sup> General Assembly resolution 67/187, annex, paras. 24 and 48.

## United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>

### Principle 5. Legal aid for witnesses

Without prejudice to or inconsistency with the rights of the accused, States should, where appropriate, provide legal aid to witnesses of crime.

### Guideline 8. Legal aid for witnesses

States should take adequate measures, where appropriate, to ensure that:

- (a) Witnesses are promptly informed by the relevant authority of their right to information, their entitlement to assistance and protection and how to access such rights;
- (b) Appropriate advice, assistance, care facilities and support are provided to witnesses of crime throughout the criminal justice process;
- (c) Child witnesses receive legal assistance as required, in line with the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime;
- (d) All statements or testimony given by the witness at all stages of the criminal justice process are accurately interpreted and translated.

**United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>**  
(continued)

States should, where appropriate, provide legal aid to witnesses.

The circumstances in which it may be appropriate to provide legal aid to witnesses include, but are not limited to, situations in which:

- (a) The witness is at risk of incriminating himself or herself;
- (b) There is a risk to the safety and well-being of the witness resulting from his or her status as such;
- (c) The witness is particularly vulnerable, including as a result of having special needs.

<sup>a</sup> General Assembly resolution 67/187, annex, paras. 25 and 49-51.

The logistics of providing early access to legal aid for suspects and accused persons mean that it is generally not appropriate for legal aid services that are designed to provide legal advice and assistance to suspects and accused persons to also provide legal aid services for victims and witnesses. Providing services to both sets of users is possible in some circumstances, but careful planning of resource allocation and service delivery are necessary to ensure that both organizational tensions and professional conflicts are adequately resolved.

**Box 13. One-stop centres for vulnerable groups in northern Sudan**

An example of a service covering both sets of users is provided by one-stop centres for vulnerable groups in northern Sudan. In 2007, the Sudanese authorities, supported by UNICEF, piloted a family and child protection unit, a one-stop centre providing services to female and child victims of crime, witnesses and accused persons. Trained police officers dealt with sensitive cases and vulnerable people in a non-threatening environment, and a range of other services were provided to clients, including legal aid. The project led to closer collaboration between the police, courts and a network of legal aid providers, and the model has since been adopted throughout northern Sudan.<sup>a</sup>

<sup>a</sup> United Nations Office on Drugs and Crime, *Handbook on Improving Access to Legal Aid in Africa*, pp. 80-81.

Legal aid providers can also assist in running mediation programmes that can help to resolve conflicts involving criminal conduct in ways that avoid the need for criminal proceedings.

**Box 14. Mediating less serious crimes in Mongolia**

There is provision in the Criminal Procedure Code of Mongolia that allows for mediation in respect of less serious crimes. The victim and the perpetrator can engage in a restorative justice mediation. If the outcome is approved by the prosecutor and it is not in the public interest to proceed with prosecution, the charge is withdrawn.

Even in the absence of such schemes, the provision of early access to legal aid to suspects and accused persons can, in itself, benefit victims and witnesses. The contribution of such access to ensuring fair and effective criminal justice systems confers benefits on all members of the community who, as a result, are likely to have more confidence in the ability of criminal justice agencies to deal with crime efficiently and effectively. A victim does not benefit from the fact that an innocent person is subjected to lengthy detention or is falsely convicted (since the real perpetrator may still be at large), or from the fact that a guilty person is inappropriately prosecuted or sentenced. Furthermore, early access to legal aid for suspects and accused persons can directly benefit victims and witnesses: legal advice may result in an early acceptance of guilt by the suspect or accused, and may also mean that the victim does not have to face a direct confrontation with the accused in the police station or at court. Prolonged trial processes, which cause distress to victims as well as the accused, may thus be avoided; restorative justice procedures, where they are available, may be pursued;<sup>93</sup> and compensation may be more speedily forthcoming.

It is also important to note that those suspected or accused of crime, and victims and witnesses, are not necessarily discrete groups of people. A person who is a victim or witness on one occasion may be a suspect or accused person on another. In some cases (for example, those involving allegations of assault), it may not be clear at the preliminary stages who is the victim and who is the perpetrator.

### Reducing costs

The extent to which early access to legal aid has quantifiable economic impacts on suspects and accused persons, their families and States can be illustrated by reference to decisions regarding pretrial detention.<sup>94</sup>

#### *Costs to individuals and their families*

Pretrial detention inevitably has cost implications for the individual concerned, as a result of loss of employment and reduced future earning capacity. Furthermore, in many countries, those detained and their families also have to pay legitimate or illegitimate charges for food, accommodation and other facilities. In countries that have social security schemes, some of this cost is transferred to the State, but in countries without significant financial support systems for the poor, most if not all of the financial burden falls on the family and local communities.

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<sup>93</sup>*Handbook on Restorative Justice Programmes*, Criminal Justice Handbook Series (United Nations publication, Sales No. E.06.V.15).

<sup>94</sup>The information in the present section is largely taken from Open Society Foundations and United Nations Development Programme, *The Socioeconomic Impact of Pretrial Detention*. See also a proposed cost-benefit model concerning pretrial detention in R. Bowles and M. Cohen, "Pre-trial detention: a cost-benefit approach", a 2008 paper prepared for the Open Society Justice Initiative and available from [www.opensocietyfoundations.org/reports/new-reports-urge-donors-enhance-and-improve-criminal-justice-investments](http://www.opensocietyfoundations.org/reports/new-reports-urge-donors-enhance-and-improve-criminal-justice-investments).



### Box 15. Costs of pretrial detention—examples from England and Wales, Mexico and Argentina

In England and Wales, half of men and two thirds of women who were employed at the time of their pretrial detention lost their jobs as a result.<sup>a</sup>

A study in Mexico in 2006 estimated that the income lost by pretrial detainees amounted to the equivalent of \$100 million<sup>b</sup>, and a similar study in Argentina in 2009 estimated a loss of the equivalent of \$10 million annually.<sup>c</sup>

Evidence from a study in Sierra Leone suggests that the costs incurred by detainees' families in visiting them and providing clothing and medical care are equivalent to about eight months of the median earnings of detainees.<sup>d</sup>

In Mexico, it was estimated that this amounted to an additional burden on detainees and their families of \$150 million per year, and in Argentina an additional \$22.5 million per year.<sup>e</sup>

<sup>a</sup> United Kingdom, Her Majesty's Inspectorate of Prisons for England and Wales, *Unjust Deserts: A Thematic Review by HM Chief Inspector of Prisons of the Treatment and Conditions for Unserved Prisoners in England and Wales* (London, 2000).

<sup>b</sup> Guillermo Zepeda Lecuona, *Costly Confinement: The Direct and Indirect Costs of Pretrial Detention in Mexico*, English language summary (New York, Open Society Institute, 2009).

<sup>c</sup> M. Derdoy and others, "The economic and social costs of preventive detention in Argentina" (Buenos Aires, Centre for the Implementation of Public Policies Promoting Equity and Growth, 2009), p. 22.

<sup>d</sup> Timap for Justice and Prison Watch Sierra Leone, *The Socioeconomic Impact of Pretrial Detention in Sierra Leone* (New York, Open Society Foundations, 2013).

<sup>e</sup> Zepeda, *Costly Confinement*, English language summary.

### Costs to States

The direct costs to States of holding people unnecessarily in pretrial detention is enormous, although such costs of course vary according to a range of factors, including the standards of detention facilities and the extent to which those held in detention are required to pay for their detention.

Of course, not all of those in pretrial detention are there unnecessarily, but if legal aid providers are instrumental in reducing the pretrial detention population by only a small proportion, the savings to the State, to families and to communities are potentially significant even when legal aid costs are factored in.

### Box 16. Costs of pretrial detention for States—examples from Germany, Ukraine, Mexico and Argentina

A German study from 1997 found that early access to legal aid during pretrial detention decreased the length of detention. It concluded that immediate access to free legal aid in cases of pretrial detention was likely to reduce the length of pretrial detention by 24 days on average.<sup>a</sup>

A 2006 study in Ukraine found that the total annual cost of pretrial detention was \$51 million, of which the State paid 59 per cent (the remainder being paid by detainees and their families).<sup>b</sup>

In Mexico, the annual cost has been estimated at \$454 million, and in Argentina \$75 million.<sup>c</sup>

<sup>a</sup> Schöch, *Der Einfluß der Strafverteidigung auf den Verlauf der Untersuchungshaft: Erfahrungsbericht über ein Projekt der Hessischen Landesregierung zur Entschädigung von Anwälten für die Rechtsberatung von Untersuchungsgefangenen* (Baden-Baden, Germany, Nomos, 1997), p. 73.

<sup>b</sup> M. Buromensky, O. Serduk and V. Tocheny, *Assessment of Social and Economic Costs of Pretrial Detention Application: Analytical Report* (Kyiv, American Bar Association Rule of Law Initiative, 2008).

<sup>c</sup> Zepeda, *Costly Confinement*, English language summary, and Derdoy and others, "The economic and social costs of preventive detention in Argentina" (Buenos Aires: Centre for the Implementation of Public Policies Promoting Equity and Growth, 2009), p. 22.



## D. Challenges and barriers to early access

The present section briefly examines some of the major factors that may inhibit effective implementation of the early access provisions of the United Nations Principles and Guidelines. Recognizing these challenges is the first step in overcoming them. Two sets of challenges are considered: challenges to establishing an appropriate legal framework for early access; and challenges to effective implementation of that framework.

### Challenges to establishing an appropriate legal framework

Chapter III sets out the essential legal framework that is necessary to give effect to the early access provisions of the United Nations Principles and Guidelines. Establishing the legal framework requires an understanding of the importance of early access in securing justice and a fair trial, as well as the political will to give effect to the relevant international norms and standards. Bar associations and civil society organizations can play a crucial role in lobbying for change, demonstrating need, educating politicians and policymakers and proposing appropriate legislative reform.

#### *“Legal aid is unnecessary at the pretrial stage”*

One barrier to acceptance of the need for legislative recognition of the right to early access to legal aid is the belief that the focus for the determination of guilt or innocence is the trial and that, while legal assistance may be necessary to guarantee a fair trial at that stage, it is not necessary at the stage when a crime is being investigated or when a decision about pretrial detention is made. This is often associated with a belief, particularly in countries with an inquisitorial tradition, that, to the extent that the police carry out investigations, they do so neutrally on behalf of the prosecutor or the court. A common belief is that interrogation of suspects by the police is designed to uncover “the truth” and that the involvement of a legal aid provider in this process will interfere with truth discovery. This approach is not confined to countries with an inquisitorial tradition.

One approach to countering such beliefs and attitudes is to argue that international norms and standards relating to fair trial require that suspects have a right to legal advice and assistance at the early stages of the criminal justice process, and that the right must be respected. A second approach is to demonstrate the significant benefits that early access can have for suspects and accused persons, their families and the wider community.

#### *“Legal aid will interfere with the investigation of crime”*

A particular concern in many countries, especially in the context of limited investigative resources, is that the police need confessions from suspects in order to secure convictions and that, if suspects have legal advice and assistance at the investigative stage, they will be less likely to confess. It should be noted here that the International Covenant on Civil and Political Rights, in its article 14, paragraph 3 (g), provides that a person must neither be compelled to testify against himself or herself nor be compelled to confess. The Human Rights Committee has held that it follows from

the prohibition on forced confessions that there must be no direct or indirect physical or psychological coercion by the investigative authorities, and that the prosecution must prove that a confession was made without duress.<sup>95</sup> Nevertheless, it is a significant challenge that the police often do not have the necessary skills, facilities or resources to be able to find and secure other forms of evidence. For the right to early access to legal aid to be implemented and effective, the police need training to equip them with evidence-gathering skills, and the facilities and resources to be able to use those skills.

This has been recognized in a number of countries, and action has been taken to address the needs of the police.

**Box 17. Improving police investigations to reduce reliance on confessions—examples from Pakistan and Bangladesh**

In Pakistan, police reliance on confessions has been reduced by the introduction of training programmes supported by UNODC on investigative interviewing, and the establishment of forensic science laboratories.

In Bangladesh, the UNDP Police Reform Programme has supported the capacity development of police for undertaking investigations in a timely and professional manner based on sound evidence, and assists with case management and improved preparation and presentation. As a result of the programme, investigation and prosecution processes rely less on confessions and more on “hard” evidence, and there has been an improvement in criminal intelligence-gathering and more effective collaboration between the police and other criminal justice agencies.

*“Providing legal aid is expensive”*

A further barrier to establishing the necessary legal framework for early access to legal aid is concern about the cost. Establishing early access to legal aid undoubtedly does have cost implications for public expenditure, although, as demonstrated in the present chapter, such spending can be offset by savings in other areas of public expenditure. Furthermore, to the extent that early access contributes to greater confidence in the justice system and improved integration, it can lead to wider cost savings. The cost of establishing a scheme for early access to legal aid depends on a range of factors, including the level of existing provision, the model adopted for delivery of such access and the level of demand. As a result, costs do vary widely among countries that have early access schemes. The following example from Georgia shows that the cost can be relatively modest.

**Box 18. Costs of the public defender scheme in Georgia**

A public defender scheme was established in Georgia in 2007, providing criminal defence services through 16 offices and employing 132 lawyers. The cost of the public defender service, which provides criminal defence services at all stages of the criminal justice process, was \$1.8 million in 2012. This is equivalent to \$0.40 per head of population.

<sup>95</sup>See, for example, the views of the Human Rights Committee in *Singarasa v. Sri Lanka*, adopted on 21 July 2004 (Communication No. 1033/2001 (CCPR/C/81/D/1033/2001)); the views of the Human Rights Committee in *Dunaev v. Tajikistan*, adopted on 30 March 2009 (Communication No. 1195/2003 (CCPR/C/95/D/1195/2003)); and the views of the Human Rights Committee in *Koreba v. Belarus*, adopted on 25 October 2010 (Communication No. 1390/2005 (CCPR/C/100/D/1390/2005)).

*“The public is not in favour of legal aid”*

Political attitudes towards establishing a scheme for providing legal aid are often informed by public attitudes. Procedural rights for suspects and accused persons generally, and for early access schemes in particular, are often not popular with individuals and communities. This may be particularly so when ensuring that those rights are respected involves expenditure of scarce public resources. Negative attitudes may be reinforced by a fear of crime and the belief that providing suspects and accused persons with legal assistance enables those guilty of committing criminal offences to avoid prosecution and punishment.<sup>96</sup> In some communities, the fear of crime is both real and justified by the prevalence of criminal and antisocial behaviour, although studies in some countries have shown that the fear of being a victim of crime is much greater than the real risk.<sup>97</sup> Attitudes appear to be significantly affected both by representations of crime in the media and by political discourse, and often there is a cycle of mutual reinforcement.

For these reasons, the establishment of effective and sustainable schemes for early access to legal aid needs to rely on careful public engagement, so that local communities have a sense of ownership and an understanding of the ways in which they may benefit from such schemes. This includes not only benefits to individuals as potential suspects or victims, but also wider economic and social benefits such as the contribution that early access schemes can make to the transparency and accountability of criminal justice processes and institutions, and the reinforcement of the rule of law.

“Town hall” or “courtyard” meetings are used by NGOs and other organizations in a number of countries to inform local communities of their rights and to reach people who otherwise would not use their services. This approach can also be useful as a way of giving legal aid rights legitimacy with the public.

**Box 19. Courtyard meetings to facilitate awareness of legal rights and remedies in Bangladesh**

The Bangladesh Legal Aid and Services Trust (BLAST) holds monthly meetings for individuals living in the Gopibagh Basti slum in Dhaka, with a view to providing information regarding rights within the family and the right to freedom from violence, and offers legal advice to the participants. The awareness training with regard to legal rights focuses on family law (marriage, divorce, dower, maintenance, guardianship and custody) and criminal law (remedies for child marriage, polygamy, dowry demands, domestic violence, safeguards to personal liberty, freedom from arbitrary arrest and torture). The meetings also provide information on certain basic issues such as reporting criminal offences to the police.

<sup>96</sup>See, for example, South Sudan, Ministry of Justice, *Legal Aid Strategy 2011-2013*, prepared by the Ministry of Justice in cooperation with the United Nations Development Programme South Sudan, paras. 12-14.

<sup>97</sup>For a United Kingdom study, see M. Scribbins and others, *Public Perceptions of Policing, Engagement with the Police and Victimisation: Findings from the 2009/10 British Crime Survey Supplementary Volume 1 to Crime in England and Wales 2009/10*, Home Office Statistical Bulletin 19/10 (London, Home Office, 2010).

### *Challenges to effective implementation*

Chapters IV, V and VI deal with the institutional arrangements for organizing and delivering early access to legal aid, the roles and responsibilities of legal aid providers in providing such access and the roles and responsibilities of the police, prosecutors and judges in facilitating and enforcing such access. All play a critical role in ensuring that legislation governing early access to legal aid results in real and effective access by those entitled to it.

### *Establishing a legal framework*

The first challenge to effective implementation of a legal framework for early access is the establishment and funding of an institution that has responsibility for creating, managing and monitoring the mechanisms by which early access to legal aid is delivered. A key aspect of a credible and sustainable early access scheme is the quality of the service provided. (See chapter IV).

### *Ensuring that sufficient legal aid providers are available*

A second challenge to effective implementation of such a framework is to ensure that there are sufficient legal aid providers able and willing to deliver early access.

#### **Box 20. Limited availability of lawyers—examples from Africa and the Americas**

In many countries, there are not enough lawyers to provide such access on a nationwide basis. In Africa, for example, the figures range from 1 lawyer for every 20,000 people, or even 1 lawyer for every 50,000 people to 1 lawyer per 3,000 people.<sup>a</sup> In the Americas the figures are for example 1 per 326 people or even 1 per 265 people.<sup>b</sup>

<sup>a</sup> United Nations Office on Drugs and Crime, *Access to Legal Aid in Criminal Justice Systems in Africa: Survey Report*, p. 12.

<sup>b</sup> Estimates by Australasian Legal Business. Available at <http://au.legalbusinessonline.com/news/breaking-news/overlawyered-australia-and-nz-lawyers-still-trail-world-in-market-saturation/50125>.

Furthermore, in some countries lawyers are overwhelmingly located in cities, whereas the bulk of the population lives in rural areas.<sup>98</sup> In many countries, an overwhelming number of lawyers are male, and thus may not be able to adequately cater for female suspects and accused persons.<sup>99</sup> Additionally, in cases in which language can be a barrier and interpretation is not easily available, access to lawyers who are able to communicate effectively with their clients may pose a further challenge. Even in countries that have a high ratio of lawyers to population, the majority of lawyers are often unable or unwilling to provide legal aid to criminal suspects or accused persons.

<sup>98</sup> See, in respect of Africa, United Nations Office on Drugs and Crime, *Access to Legal Aid in Criminal Justice Systems in Africa: Survey Report*, p. 13.

<sup>99</sup> For example, in Pakistan, as a result of which the United Nations Development Programme legal empowerment programme has prioritized the recruitment of female lawyers in all legal aid teams.

Furthermore, in some countries that do have early access schemes, there is a widespread reluctance by lawyers in private practice to provide effective assistance to suspects in police stations or other forms of detention, as well as a need for training to improve knowledge and skills and, sometimes, a lack of cooperation by bar associations in operating early access schemes.<sup>100</sup> Finally, despite the requirement of the United Nations Basic Principles on the Role of Lawyers that Governments must ensure that lawyers are able to perform their professional functions without intimidation or improper interference,<sup>101</sup> in some countries lawyers themselves are at risk if they actively defend the interests of their clients. This may be particularly true when handling cases that are politically sensitive, for example, human rights cases, terrorism cases or ones involving national security.

The availability of lawyers, and the form and level of remuneration for providing legal aid services, need to be taken into account in devising schemes for delivering early access. In some countries, developing schemes that use paralegals have been a solution to the limited number of lawyers. Other countries, particularly those where historically there was little provision of criminal defence services by lawyers, have established public defender services to provide legal aid to those who cannot afford to pay for a lawyer privately. (See chapter IV for information on strategies for ensuring that a sufficient number of legal aid providers are available.)

### *Changing attitudes of criminal justice actors*

A third challenge to making the right to early access to legal aid effective concerns the fact that the police and other law enforcement agents must play a key role in informing suspects of their rights and in facilitating contact with legal aid providers. In many countries, however, there is a range of cultural and organizational factors that militate against the police performing this role, including arrest or prosecution targets and other institutional requirements regarding “successful” processing of prisoners and prosecution, often combined with a fear that the involvement of a defence lawyer will interfere with the ability to satisfy those requirements. Such factors require changes to the way in which the police are managed in order to remove disincentives to facilitating early access and to positively encourage respect for the rights of the accused. Police training is also an important way of helping police officers to understand the importance of early access to legal aid and their role in facilitating it.

<sup>100</sup>See, in respect of Europe, Cape and others, *Effective Criminal Defence in Europe* (Antwerp, Belgium, Intersentia, 2010), pp. 591-592; and Cape and Namoradze, *Effective Criminal Defence in Eastern Europe* (Soros Foundation—Moldova, 2012), pp. 423-424. In Nepal, it has been found that even where criminal defence lawyers provide advice and assistance at the early stages of the criminal process, they often lack sufficient knowledge to identify when a right to bail exists, or the skill to make an effective application for it. See Nepal, *Forum for Protection of People's Rights, Assessment of Impact of Legal Aid Service in Nepal: A Study Report* (Kathmandu, Supreme Court of Nepal and United Nations Development Programme, n.d.).

<sup>101</sup>Article 16.

**Box 21. Police training on human rights including the right to a lawyer—examples from the Philippines, Australia and Liberia**

In the Philippines, officers are appointed to the role of human rights monitor or champion to encourage human rights compliance by their colleagues.

Police in the Australian state of Victoria are provided with training in human rights, using case studies to give them confidence in providing services to diverse communities, including people with disabilities, young people and multicultural and marginalized groups.

The Liberia National Police, with the support of an American law school, have a training programme for police officers which includes training on understanding and implementing the right to a lawyer, and on ethical policing.

*Improving public knowledge and understanding*

A fourth challenge to effective implementation of a legal framework for early access to legal aid is the lack of public knowledge and understanding of the right to, and benefits of, such access. This can have adverse effects on the take-up of early access, even where schemes for delivering it do exist. Suspects and accused persons may be unaware of their right to early access. In addition, given the circumstances in which they are arrested and detained, and especially if they are vulnerable, they may not understand any information given to them about their right to legal aid. Information provided orally about rights may be difficult to comprehend, and written information may not be effective in conveying information about rights if it is written in technical language or if the suspect or accused person is illiterate or poorly educated.<sup>102</sup> Public attitudes, sometimes reinforced by those of the police and judiciary, can also discourage suspects and accused persons from exercising their right of early access to legal aid even if they are aware of those rights. There is a widespread belief, prevalent in many countries, that asking for a lawyer at the investigative stage of the criminal justice process is, or may be interpreted as, an indication of guilt, or that asking for a lawyer may “escalate” the situation and make things worse for the suspect or accused person.<sup>103</sup>

A range of strategies is needed to tackle lack of knowledge and understanding of the right to early access to legal aid. The ways in which suspects and accused persons are informed of their right to such access need to be carefully considered and regulated in order to ensure that such persons are appropriately and effectively informed of their rights. This is dealt with further in chapters III and VI. A model “letter of rights”, developed by the European Union, can be found in annex IV.<sup>104</sup> Community education is also important in spreading knowledge and in challenging myths. The example of “courtyard meetings” in Bangladesh, provided earlier in the present section, illustrates how information can be made more accessible to communities. A novel way of providing information about rights, devised by the German Foreign Office, is the use of specially designed playing cards, on which are printed the rights of suspects, accused persons and prisoners.

<sup>102</sup>The written notice of rights in some countries consists of little more than extracts from the criminal procedure code or legislation. Directive 2012/13/EU of the European Parliament and Council of the European Union of 22 May 2012 on the right to information in criminal proceedings includes an annex containing an indicative model letter of rights, written in English. For other approaches, see United Nations Office on Drugs and Crime, *Handbook on Improving Access to Legal Aid in Africa*, p. 53.

<sup>103</sup>See, for example, S. Schumann, Bruckmüller and Soyer, *Pre-trial Emergency Defence* (Antwerp, Belgium, Intersentia, 2012), p. 369.

<sup>104</sup>See also the Scottish “letter of rights” available online in large-print English and 33 other languages, available via [www.scotland.gov.uk/Topics/Justice/legal/criminalprocedure/letterofrights](http://www.scotland.gov.uk/Topics/Justice/legal/criminalprocedure/letterofrights).



## SUMMARY OF KEY ISSUES

.....

1. People who are suspected or accused of crime suffer particular disadvantages at the early stages of the criminal justice process.
2. Early access to legal aid has a number of important benefits for those who are suspected or accused of crime, including:
  - Protecting them against intimidation, ill-treatment and torture
  - Protecting procedural rights such as the right to liberty, the right to be produced promptly before a judge, the right to be presumed innocent and the right to adequate time and facilities for preparation of a defence
  - Avoiding arbitrary and excessive pretrial detention, which is overused in many countries
  - Ensuring lawful and appropriate treatment, including diversion from the criminal justice process, especially for children
  - Assisting them to understand and navigate criminal justice processes.
3. Early access to legal aid helps to protect persons with special needs, such as children, women and people with vulnerabilities, and to ensure equal access to justice for women.
4. Early access to legal aid benefits the criminal justice system and the wider community by:
  - Providing information to the police, prosecutors and courts, enabling them to perform their functions more effectively
  - Ensuring that court hearings are effective
  - Improving criminal justice procedures
  - Making criminal justice agencies accountable
  - Educating the community about the criminal justice system
  - Improving the treatment and experience of victims of crime
  - Improving economy and efficiency, to the benefit of both individuals and their families, as well as the State.
5. There are a number of challenges to establishing an appropriate legal framework for early access to legal aid, but these can be addressed in several ways. Bar associations, NGOs and civil society organizations, for example, can play a key role in addressing these challenges.
6. There are a number of challenges related to effective implementation of the right to early access to legal aid, as well as a range of suggested approaches to addressing them.





# III. The right to early access: the essential legal framework

## A. Introduction

Principle 1 of the United Nations Principles and Guidelines provides that States should guarantee the right to legal aid at the highest possible level, including, where applicable, in the constitution. Principle 2 requires States to consider enacting specific legislation and regulations to ensure that a comprehensive legal aid system is in place that is accessible, effective, sustainable and credible.

### United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>

#### Principle 1. Right to legal aid

Recognizing that legal aid is an essential element of a functioning criminal justice system that is based on the rule of law, a foundation for the enjoyment of other rights, including the right to a fair trial, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process, States should guarantee the right to legal aid in their national legal systems at the highest possible level, including, where applicable, in the constitution.

#### Principle 2. Responsibilities of the State

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.

The State should not interfere with the organization of the defence of the beneficiary of legal aid or with the independence of his or her legal aid provider.

States should enhance the knowledge of the people about their rights and obligations under the law through appropriate means, in order to prevent criminal conduct and victimization.

States should endeavour to enhance the knowledge of their communities about their justice system and its functions, the ways to file complaints before the courts and alternative dispute resolution mechanisms.

States should consider adopting appropriate measures for informing their communities about acts criminalized under the law. The provision of such information for those travelling to other jurisdictions, where crimes are categorized and prosecuted differently, is essential for crime prevention.

<sup>a</sup>General Assembly resolution 67/187, annex, paras. 14-19.

Most countries give legal recognition to a right to legal aid at some stages of the criminal justice process for some, or even all, indigent suspects or accused persons, although there is considerable variation, both in terms of the extent of the right (in particular, whether it includes the right to legal advice and assistance during the pretrial stage of proceedings) and the level of specificity. Experience from around the world demonstrates that, however well the law provides for a right to early access, it will not work in practice without an adequately funded set of institutions that can both organize and implement the right so that it is established as a crucial, and routine, aspect of the criminal justice system.<sup>105</sup>

Establishing, delivering and sustaining early access to legal aid requires, in addition to primary legislation and funding, the following elements:

- *Regulations* that set out in detail the circumstances in which a person is entitled to legal aid, the rules regarding financial eligibility, whose responsibility it is to inform suspects and accused persons of their entitlement and how to exercise it, how legal aid is to be delivered and by whom and how actions taken and decisions made are to be verified.
- *Procedures and protocols* for implementing the law and regulations in individual cases, for example, how regulations governing the provision of information about the right to legal aid are to be implemented in individual cases, how the provision of information and the decision of the suspect or accused person is to be recorded, the process by which a legal aid provider is to be contacted and what information has to be recorded.
- *Appropriate professional cultures and attitudes* that ensure that all criminal justice actors work effectively to make sure that the right to early access to legal aid is respected.

The present chapter concentrates on the legislative, regulatory and procedural requirements for ensuring that the right to early access to legal aid is effective. It sets out the key elements of a regulatory regime that should be considered in any country. Legislation concerning State-funded legal aid and legal aid institutions, and models for delivery of legal aid, are dealt with more fully in chapter IV. How the regulatory regime is implemented in any particular country depends on factors that are particular to that country: whether it has a written constitution; the extent to which existing laws provide for early access to legal aid; and the approach to dividing regulation between primary and secondary legislation. However, it is suggested that all

<sup>105</sup>See, for example, United Nations Development Programme, *Legal Aid Service Provision: A How-To Guide on Legal Aid Programming in Africa* (New York, UNDP, 2013).

aspects of the regulatory regime covered in the present chapter should (subject to the exceptions noted in the text) be formally regulated rather than merely be the subject of guidance or protocols issued by Government ministries, prosecutors or police authorities. This will help to ensure that regulation of early access to legal aid is clear, appropriate, transparent and democratically accountable. This is important since these are procedural provisions that are intended to give effect to the right to legal aid, and that are usually included in legislation.

## B. The right to early access to legal aid

Whether a right to early access to legal aid—in terms of a right to both legal advice, assistance and representation, and to State-funded legal aid—is provided for in the constitution or legislation, or a combination of both, depends in part on the constitutional tradition and culture of a particular country. A minority of countries do not have a written constitution, and the constitutions of many countries predate modern forms of crime investigation and the recognition of procedural rights at the early stages of the criminal justice process as fundamental rights. Some constitutions, generally ones written more recently (for example, the Constitution of South Africa), do explicitly set out the right of an arrested or detained person to legal advice and assistance and/or free legal aid at the early stages of the criminal justice process.<sup>106</sup>

However, even if a constitutional document does set out a right to early access to legal aid, it requires legislation and regulations to set out the precise ambit of the right; otherwise, it falls to the courts to interpret the scope of the right. For example, regulating these issues in legislation allows for establishing a comprehensive legal framework that gives effect to the right to early access to legal aid and creates certainty as to the content of the right.

### Box 22. Right to legal aid provided in constitutions—examples from South Africa and Canada

The Constitution of the Republic of South Africa (1996) in Section 35, paragraph (2) notes that

“Everyone who is detained, including every sentenced prisoner, has the right —

...

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;”

The Canadian Charter of Rights and Freedoms, in its article 10, provides that “Everyone has the right on arrest or detention ... b) to retain and instruct counsel without delay and to be informed of that right...”, but the precise meaning of the right has required interpretation in a series of Supreme Court judgements.<sup>a</sup>

<sup>a</sup>See Simon Verdun-Jones and A. Tijerino, *A Review of Brydges Duty Counsel Services in Canada* (Canada, Department of Justice, undated).

<sup>106</sup>Other examples include Bulgaria, the Democratic Republic of the Congo, Lithuania, Malawi and Mali.

## To whom the right applies

The right to legal aid is set out in principle 3 of the United Nations Principles and Guidelines:

### United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>

#### Principle 3. Legal aid for persons suspected of or charged with a criminal offence

States should ensure that anyone who is detained, arrested, suspected of or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process.

Legal aid should also be provided, regardless of the person's means, if the interests of justice so require, for example, given the urgency or complexity of the case or the severity of the potential penalty.

<sup>a</sup>General Assembly resolution 67/187, annex, paras. 20-21.

Therefore, the right to legal aid without reference to financial means always applies to:

- Any person suspected of or charged with a criminal offence punishable by a term of imprisonment or the death penalty. The right applies from the time the person suspected of such an offence is placed under investigation, whether or not the person has been arrested or detained, and continues throughout all stages of the criminal justice process.
- Any person arrested or detained in respect of a non-imprisonable offence, when this is justified by the urgency of the circumstances. This will be the case while the person is under arrest and up to and including when he or she appears before a court for the purposes of making a decision regarding pretrial detention.

When a person is suspected of or charged with a non-imprisonable offence, his or her financial means can be taken into account in determining eligibility for State-funded legal aid if: (a) he or she is not arrested or detained; or (b) if he or she has been arrested or detained, but the urgent circumstances no longer apply, provided that there are no other reasons why the interests of justice require legal aid to be provided without regard to means.

The right to legal aid applies in all criminal cases. There is no exception for cases involving terrorism or other serious offences (but see derogation from the right to legal aid below). The term “criminal” is not defined in the United Nations Principles and Guidelines. Some countries have administrative law systems, which have some or most of the characteristics of criminal law systems. While the United Nations Principles and Guidelines are not intended to apply to administrative law systems,<sup>107</sup>

<sup>107</sup>For example, systems under which minor regulatory “offences” are dealt with by the police or non-judicial officials who have the power to impose relatively small financial penalties.

some States, or law enforcement officials within some States, may be tempted to avoid the right to legal aid by dealing with people under the administrative law system rather than the criminal justice system.

**Box 23. Warning against using administrative law systems instead of criminal justice systems to deny rights—example of European Court of Human Rights**

The European Court of Human Rights has warned of the dangers of using administrative courts to circumvent the right to legal aid.<sup>a</sup> It has consistently held that, in determining whether a person is to be treated as being the subject of a criminal charge, the following factors should be taken into account:

- The domestic classification, that is, how the charge is classified in the jurisdiction concerned.
- The nature of the “offence”.
- The nature and degree of severity of any possible penalty.<sup>b</sup>

<sup>a</sup>“... if the Contracting States were able at their discretion, by classifying an offence as ‘regulatory’ instead of criminal, to exclude the operation of the fundamental clauses of articles 6 and 7, the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purposes of the Convention” (European Court of Human Rights, *Öztürk v. Germany*, Application No. 8544/79, Judgement of 21 February 1984, para. 49). The European Court of Human Rights has repeatedly condemned Ukrainian police for using informal or administrative detention to avoid procedural rights (see, for example, European Court of Human Rights, *Balitskiy v. Ukraine*, Application No. 12793/03, Judgement of 3 November 2011).

<sup>b</sup> See *Engels v. Germany* (1979-80) 1 EHRR 706.

The right to legal aid should be clearly set out in the constitution and/or legislation. Many States that have legislation for a right to early access to legal aid distinguish in their legislation between the right to legal advice and assistance and the right to legal aid that is funded by the State. The distinction is important because the right to consult a lawyer at the early stages of the criminal justice process may be more extensive than the right to State-funded legal aid.<sup>108</sup>

**Box 24. The right to consult a lawyer as distinct from the right to access State-funded legal aid—examples from New Zealand and Togo**

The New Zealand Bill of Rights Act 1990, in its section 23, provides that everyone who is arrested or detained under any enactment has the right to consult and instruct a lawyer without delay, while entitlement to State-funded legal aid is separately governed by the Legal Services Act 2011.

The Constitution of Togo, in article 16, provides that every accused has the right to legal counsel at the stage of preliminary investigation. However, a legal aid bill was not adopted until 2012, and a legal aid fund is awaiting approval by the National Assembly.

In many jurisdictions, the right to legal advice and assistance during the investigative stage is expressed as a right of the suspect, which he or she may waive. However,

<sup>108</sup>For example, a person who is being investigated in respect of a non-imprisonable offence may have a right to legal advice and assistance, but not a right to State-funded legal aid.

in some countries, legal advice and assistance are mandatory in certain circumstances, for example:

- When a person is arrested or detained in respect of a serious offence.
- When the police wish to carry out specified investigative procedures (in particular, interrogation).<sup>109</sup>
- When the suspect falls into a certain category, for example, he or she is a child or has mental health care needs.<sup>110</sup>

The United Nations Principles and Guidelines do not require a State to have legislation making legal aid mandatory. If it is not mandatory, however, the provision of information about the right and the exercise of waiver of the right should be carefully regulated and monitored. (See sections C and D below for a further discussion on the obligation of States to provide information on and regulation of the waiver of the right.)

### *Women, children and other persons with special needs*

The provisions of the United Nations Principles and Guidelines regarding women, children and other persons with special needs or vulnerabilities, should be appropriately reflected in legislation and regulations. (See chapter II, section B). While suspects or accused persons who are members of such groups have the same minimum rights to legal aid as other individuals, additional provisions should be considered to ensure that they are given meaningful access to these rights.<sup>111</sup>

In some countries, legal aid (that is, State-funded legal aid, and legal advice and assistance) is mandatory for children and certain other persons who have special needs, such as those with mental health care needs. Alternatively, or in addition, the law in some countries requires that an independent adult, such as a parent or social worker, be called in to assist suspects with specific vulnerabilities. Mental vulnerability is widely defined to include a person who, because of his or her mental state or capacity, may not understand the significance of what is said, questions asked of them or their replies to such questions.<sup>112</sup>

#### **Box 25. Mandatory provision of legal aid for children and people with mental disabilities—example from England and Wales**

In England and Wales, for example, when a child is detained in a police station, the police must call in an “appropriate adult”—a parent, social worker or other adult who is independent of the police—who may decide whether to exercise the right to legal aid and who normally must be present during any police interview. There is a similar obligation when a police officer has any suspicion, or is told in good faith, that a suspect may be mentally disordered or otherwise mentally vulnerable.

<sup>109</sup>For example, Argentina, Colombia, Italy and Peru.

<sup>110</sup>For example, Croatia, Lithuania and Poland.

<sup>111</sup>The Human Rights Committee has determined that it is a breach of the International Covenant on Civil and Political Rights for a child to be arrested without being provided with “appropriate assistance in the preparation and presentation of their defence” (CCPR/C/92/D/1209, 1231/2003 & 1241/2004, para. 6.6).

<sup>112</sup> See United Kingdom, Police and Criminal Evidence Act 1984, Code of Practice C, Note for Guidance 1G.

### When the right applies

Principle 3 provides that the right to legal aid applies to anyone “who is arrested, detained, suspected of or charged with” a criminal offence. The terms “arrest” and “charge” are defined differently in different jurisdictions. In some, for example, a person suspected of a criminal offence may be lawfully detained by the police for some time, and interviewed, before being “arrested”. Furthermore, there is extensive evidence that, in countries where there is a right to early access to legal aid, the police and other law enforcement agencies sometimes use the lack of precision in the relevant legislative provisions, or flexibility in determining a person’s status, to deny procedural rights to people who are suspected of a criminal offence.<sup>113</sup>

Therefore, legislation governing the right to early access to legal aid, both the right to State-funded legal aid and the right to legal advice and assistance, should be clear and precise as to when the right arises.<sup>114</sup> The Human Rights Committee has consistently held that failure to allow access to a lawyer during the initial period of detention, and during any interrogation, amounts to a breach of the International Covenant on Civil and Political Rights (article 14, paragraphs 3 (b) and (d)).<sup>115</sup> Since the United Nations Principles and Guidelines refer to the right to legal aid as arising upon arrest, detention or suspicion of a criminal offence, national legislation should provide that the right to legal aid applies at least from the time that a person is de facto arrested, irrespective of the legal designation of such status.

#### Box 26. Interpretation of when the right to legal aid applies—examples from Europe

The European Court of Human Rights has held that “access to a lawyer should be provided as from the first interrogation of a suspect by the police”.<sup>a</sup> In a later case, however, the court indicated that the right should apply as soon as there is significant curtailment of a suspect’s freedom, which would include detention short of arrest.<sup>b</sup> The proposed European Union directive on the right of access to a lawyer provides that States must ensure that, when a lawyer is present during questioning, he or she must be able to “participate effectively”.

<sup>a</sup>See European Court of Human Rights, *Salduz v. Turkey*, para. 55. This is a similar formula to that adopted by the United States Supreme Court in *Miranda v. Arizona*.

<sup>b</sup>European Court of Human Rights, *Zaichenko v. Russia*, Application No. 39660/02, Judgement of 18 February 2010; followed by the United Kingdom Supreme Court in *Cadder v. Her Majesty’s Advocate* [2010] UKSC 43.

<sup>113</sup>See, in respect of European jurisdictions, Cape and others, *Effective Criminal Defence in Europe*, pp. 584-585; Cape and Namoradze, *Effective Criminal Defence in Eastern Europe*, pp. 446-448; and Schumann, Bruckmüller and Soyer, Pre-trial Emergency Defence, pp. 357-358.

<sup>114</sup>For a survey of the legislative provisions governing the right to legal assistance in Africa, see United Nations Office on Drugs and Crime, *Access to Legal Aid in Criminal Justice Systems in Africa: Survey Report*, annex I.

<sup>115</sup>See, for example, views of the Human Rights Committee in *Gridin v. Russian Federation*, adopted on 20 July 2000 (Communication No. 770/1997 (CCPR/C/69/D/770/1997)); views of the Human Rights Committee in *Caranza Alegre v. Peru*, adopted on 28 October 2005 (Communication No. 1126/2002 (CCPR/C/85/D/1126/2002)); and views of the Human Rights Committee in *Toshev v. Tajikistan*, adopted on 30 March 2011 (Communication No. 1499/2006 (CCPR/C/101/D/1499/2006)).



According to the United Nations Principles and Guidelines, States must introduce measures to “prohibit, in the absence of any compelling circumstances, any interviewing of a person by the police in the absence of a lawyer” unless the suspect waives the right.<sup>116</sup> This is in line with the law of many jurisdictions and the jurisprudence of both national and international courts (see derogation from the right to legal aid below).<sup>117</sup> National legislation should therefore provide that the right to early access to legal aid includes the right to the assistance of a legal aid provider during police interrogation.

Consideration should also be given, perhaps in regulations, to specifying what a legal aid provider is permitted to do during police interrogations. The role of the lawyer when advising and assisting a suspect at a police station can be set out in a statutory code of practice.

#### **Box 27. Role of the lawyer in police stations—example from England and Wales**

In England and Wales, the solicitor’s only role in the police station is to protect and advance the legal rights of his or her client. On occasion, this may require the solicitor to give advice which has the effect of the client avoiding giving evidence, which strengthens the prosecution case. The solicitor may intervene in order to seek clarification, challenge an improper question to his or her client or the manner in which it is put, advise the client not to reply to particular questions, or indicate that he or she wishes to give the client further legal advice.<sup>a</sup>

<sup>a</sup>See United Kingdom, Police and Criminal Evidence Act 1984, Code of Practice C, Note for Guidance 6D.

### **Derogation from the right to legal aid**

The United Nations Principles and Guidelines, reflecting international norms, treat the right to legal aid, both the right to State-funded legal aid and the right to legal advice and assistance, as normally being an absolute right for those to whom it applies. While it is accepted internationally that an accused or a person who has been charged with a criminal offence has an absolute right to legal representation, the laws of some countries permit the right to legal advice and assistance to be restricted or delayed during the investigative stage of the criminal justice process.

#### **Box 28. Regulation of permissible delays in accessing a lawyer—example from England and Wales**

In England and Wales access to a lawyer can be delayed for up to a maximum of 36 hours, but only if authorized by a senior police officer who has reasonable grounds for believing that contact with a lawyer will lead to certain consequences, such as the alerting of other suspects or the destruction of evidence. Once a suspect has been charged with an offence, he or she has an absolute right to consult a lawyer.<sup>a</sup>

<sup>a</sup>United Kingdom, Police and Criminal Evidence Act 1984, part V, section 58, subsections (6)-(11).

<sup>116</sup>United Nations Principles and Guidelines, para. 43 (guideline 3).

<sup>117</sup>In Europe, see, for example, European Court of Human Rights, *Sebalj v. Croatia*, Application No. 4429/09, Judgement of 28 June 2011; European Court of Human Rights, *Mader v. Croatia*, Application No. 56185/07, Judgement of 21 June 2011; the decision of the French Conseil constitutionnel, Decision No. 2010-14/22 QPC of 30 July 2010; and the proposed directive of the European Parliament and of the Council of the European Union on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (Brussels, 31 May 2013, document 10190/13). For a survey of African countries, see United Nations Office on Drugs and Crime, *Handbook on Improving Access to Legal Aid in Africa*, pp. 51 and 52.



The United Nations Principles and Guidelines do not permit derogation from the right to consult a lawyer at the investigative stage, but they do permit a person to be interviewed in the absence of a lawyer if there are compelling circumstances.<sup>118</sup> However, the police and judicial authorities must not arbitrarily restrict the right of access to a lawyer, particularly in police stations.<sup>119</sup> It is suggested that, if the law of a particular country provides for derogation from the right to legal aid, such derogation should be clearly and narrowly defined.

**Box 29. Regulation on limiting access to a lawyer—example from the European Court of Human Rights**

The European Court of Human Rights has held that such limits on the right of access during the investigative stage are permissible only if, in the particular circumstances of a case, there are compelling reasons for doing so. The Court has not defined “compelling reasons”, but the proposed European Union directive on the right of access to a lawyer provides that there may be a temporary derogation from the right of access to a lawyer only when, in the particular circumstances of a case, it is justified by: (a) an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; and/or (b) a need for immediate action by the investigating authorities to prevent substantial jeopardy to criminal proceedings. Any such derogation must:

- Be proportionate and not go beyond what is necessary
- Be strictly limited in time
- Not be based exclusively on the type or seriousness of the alleged offence
- Not prejudice the overall fairness of the proceedings.<sup>a</sup>

Thus, a blanket derogation applicable to certain types of suspected offences, such as terrorist offences, is not permissible, and derogation is an exceptional action which must always be justified by reference to the particular circumstances of a case.

<sup>a</sup>Proposed directive of the European Parliament and of the Council of the European Union on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, art. 3, para. 6, and art. 8, para. 1.

## C. Information about the right to early access

Principle 8 of the United Nations Principles and Guidelines requires States to ensure that persons are informed of their right to legal aid (and other procedural rights) at the time of deprivation of liberty and prior to any questioning.

**United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>**

**Principle 8. Right to be informed**

States should ensure that, prior to any questioning and at the time of deprivation of liberty, persons are informed of their right to legal aid and other procedural safeguards as well as of the potential consequences of voluntarily waiving those rights.

States should ensure that information on rights during the criminal justice process and on legal aid services is made freely available and is accessible to the public.

<sup>a</sup>General Assembly resolution 67/187, annex, paras. 29-30.

<sup>118</sup>Proposed directive of the European Parliament and of the Council of the European Union on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, art. 3, para. 6, and art. 8, para. 1.

<sup>119</sup>United Nations Principles and Guidelines, para. (44) (a) (guideline 4).

In addition, States should ensure that information about such rights is made freely available to the public in an accessible form. The obligation to provide information is more fully set out in guidelines 2, 3 and 4.

### Information for suspects and accused persons

Regulations should require police officers, prosecutors, judicial officers and detention facility officials to promptly inform suspects, accused persons, those charged with an offence or any person who is detained or imprisoned of his or her right to consult a lawyer and (if applicable) to legal aid. This information should be provided in a language that the person understands and, in particular, should be provided in a manner that corresponds with the needs of children (taking into account their age and maturity), illiterate persons, minorities and persons with disabilities.

#### United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>

##### Guideline 2. Right to be informed on legal aid

In order to guarantee the right of persons to be informed of their right to legal aid, States should ensure that:

(c) Police officers, prosecutors, judicial officers and officials in any facility where persons are imprisoned or detained inform unrepresented persons of their right to legal aid and of other procedural safeguards;

(d) Information on the rights of a person suspected of or charged with a criminal offence in a criminal justice process and on the availability of legal aid services is provided in police stations, detention centres, courts and prisons, for example, through the provision of a letter of rights or in any other official form submitted to the accused. Such information should be provided in a manner that corresponds to the needs of illiterate persons, minorities, persons with disabilities and children; and such information should be in a language that those persons understand. Information provided to children must be provided in a manner appropriate to their age and maturity;

##### Guideline 3. Other rights of persons detained, arrested, suspected or accused of, or charged with a criminal offence

States should introduce measures:

(a) To promptly inform every person detained, arrested, suspected or accused of, or charged with a criminal offence of his or her right to remain silent; his or her right to consult with counsel or, if eligible, with a legal aid provider at any stage of the proceedings, especially before being interviewed by the authorities; and his or her right to be assisted by an independent counsel or legal aid provider while being interviewed and during other procedural actions;

<sup>a</sup>General Assembly resolution 67/187, annex, paras. 42-43.

The United Nations Principles and Guidelines do not determine the form in which the information should be given, but a number of jurisdictions<sup>120</sup> require that it be provided both orally and in writing, and in a manner which could be regarded as

<sup>120</sup>See European Parliament and Council of the European Union directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings.

good practice. In order to ensure that the correct information is given, regulations or protocols should set out a standard text, which can be adapted or further explained to take account of the particular needs of the recipient. It is important that any written notice, or “letter of rights”, be capable of being understood. (See annex VI for an example of a standard, “plain English” letter of rights which has been adopted by the European Union as a model for all member States).

In addition, a notice of the right to legal aid (and other rights) should be prominently displayed in police stations and other places of detention in locations where it is likely to be seen by those detained or imprisoned. A useful mechanism adopted in some countries for ensuring that rights are brought to the attention of people who may not understand the local language is for a notice to be displayed in a prominent position, setting out the rights in all of the languages frequently encountered in a particular police station or detention facility. This approach may be adapted, using pictures, to cater for those who are illiterate.

#### United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>

##### Guideline 4. Legal aid at the pretrial stage

To ensure that detained persons have prompt access to legal aid in conformity with the law, States should take measures:

(e) To provide every person, on admission to a place of detention, with information on his or her rights in law, the rules of the place of detention and the initial stages of the pretrial process. Such information should be provided in a manner that corresponds to the needs of illiterate persons, minorities, persons with disabilities and children and be in a language that the person in need of legal aid understands. Information provided to children should be provided in a manner appropriate for their age and maturity. The information material should be supported by visual aids prominently located in each detention centre;

<sup>a</sup>General Assembly resolution 67/187, annex, para. 44.

### Information for the public

States should ensure that information on the right to legal aid, what such aid consists of, and how to access legal aid services, is made available to the public (principle 8 and guideline 2 of the United Nations Principles and Guidelines). Such information can be made available in local government offices and educational and religious institutions. It can also be made more widely available through the use of various forms of print- and Internet-based media. Such information should be made available to isolated and marginalized groups, using means that are most likely to be effective, such as targeted community meetings.

The requirement to provide information to the public is not necessarily a proper subject for regulation but might, for example, be identified in legislation or regulations as a responsibility of the body established to administer legal aid, or in any contract or agreement with a legal aid service provider, as a responsibility of the service provider under the contract.

## D. Waiver of the right to legal aid

Since access to legal aid is expressed as a right, a suspect or accused person should be granted access to a legal aid provider unless he or she waives that right. Furthermore, the remedies referred to in section G below should apply unless the police or other relevant authority can demonstrate, in a particular case, that the right was waived. If national legislation provides for mandatory legal aid in certain cases, there can be no waiver.<sup>121</sup> If legal aid is not mandatory for children or other vulnerable suspects or accused persons, legislation should provide for appropriate protective mechanisms, as indicated in section B above.

Suspects and accused persons need to be informed of the implications of waiving this right in a clear and plain manner. Any such waiver must be done on the basis of informed and voluntary consent.

### United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>

#### Guideline 3. Other rights of persons detained, arrested, suspected or accused of, or charged with a criminal offence

States should introduce measures:

(b) To prohibit, in the absence of any compelling circumstances, any interviewing of a person by the police in the absence of a lawyer, unless the person gives his or her informed and voluntary consent to waive the lawyer's presence and to establish mechanisms for verifying the voluntary nature of the person's consent. An interview should not start until the legal aid provider arrives;

(i) To ensure that persons detained, arrested, suspected or accused of, or charged with a criminal offence are advised of their rights and the implications of waiving them in a clear and plain manner; and should endeavour to ensure that the person understands both;

<sup>a</sup>General Assembly resolution 67/187, annex, para. 43.

The interpretation of “informed and voluntary” by national courts is important because of the evidence from a number of jurisdictions that the police may discourage suspects and accused persons from exercising their right to legal advice and assistance, and because children and other vulnerable suspects and accused persons are particularly prone to being persuaded not to exercise the right. Furthermore, in addition to expressing a waiver of the right, in some jurisdictions, a suspect may be treated as implicitly waiving the right by his or her conduct, for example, by asking for legal assistance, but then proceeding to answer police questions.

<sup>121</sup>When legal aid is provided free of charge at the early stage, suspects should be informed of their right to free legal aid, since the costs of obtaining legal advice may be a consideration in their decision on whether to waive their right.

**Box 30. Interpretations of “voluntary” and “informed” waiving of rights—examples from the United States and the European Court of Human Rights**

While in the United States the *Miranda* decision of the Supreme Court imposed a “heavy burden” on the prosecutor to establish that the suspect waived his or her right, subsequent case law has permitted such a waiver to be implied from the fact that the suspect proceeded to answer questions.<sup>a</sup>

The European Court of Human Rights, however, has held that, before a suspect can be said to have implicitly waived his or her right to legal assistance, it must be shown that he or she could reasonably have foreseen what the consequences would be.<sup>b</sup>

<sup>a</sup>C. Weisselberg, “Mourning Miranda”, *California Law Review*, vol. 96, No. 6 (1998), pp. 1519-1602 (see especially pp. 1577-1589).

<sup>b</sup>In *Pishchalnikov v. Russia*, Application No. 7025/04, Judgement of 24 September 2009, the European Court of Human Rights held that in order for a waiver to be treated as valid it must be shown that the suspect could reasonably have foreseen what the consequences would be. The United States Supreme Court has declined to require officers to ask questions to clarify a suspect’s decision to waive his or her right to legal assistance (*Davis v. United States*, 512 U.S. 452 (1994)).

It is important, therefore, for regulations to govern not only the way in which suspects and accused persons are informed of their right to legal aid, but also the circumstances in which they decide whether to exercise or waive that right. Such regulations may provide that, in order for a waiver to be valid, it must be demonstrated that:

- A waiver was given voluntarily and unequivocally. Consideration should be given to reinforcing this by a regulation that prohibits police officers and other officials from seeking to dissuade suspects and accused persons from exercising the right to consult with a legal aid provider.<sup>122</sup>
- The suspect or accused person received legal advice on the consequences of such a waiver,<sup>123</sup> or otherwise had sufficient knowledge to enable him or her to foresee the consequences of such a waiver.
- The suspect or accused person had the necessary capacity to understand the consequences of waiver.
- The suspect or accused person was informed that a waiver was revocable at any stage of the proceedings.

The regulations should also provide for a mechanism for verifying the voluntary nature of the person’s consent.<sup>124</sup>

<sup>122</sup>For example, in England and Wales, the relevant Code of Practice (Code C) of the Police and Criminal Evidence Act 1984 states that “No police officer should, at any time, do or say anything with the intention of dissuading a detainee from obtaining legal advice”.

<sup>123</sup>For example, the Constitution of the Philippines, art. III, sect. 12, para. 1, provides that the right to legal assistance “cannot be waived except in writing and in the presence of counsel”. A similar provision has been adopted in Belgium and Ukraine.

<sup>124</sup>United Nations Principles and Guidelines, para. 43 (b) (guideline 3).

## E. Giving effect to a request for early access to legal aid

### The obligation to give effect to a request

The combined effect of principle 7 and guidelines 3 and 4 of the United Nations Principles and Guidelines is that States have responsibility for ensuring that suspects and accused persons who want to exercise their right to legal aid are provided with the means to contact a legal aid provider, that they are provided with legal aid promptly and that any interview by the police or other authorities does not commence until the legal aid provider arrives and has the opportunity to provide advice and assistance to the suspect or accused person.

Therefore, regulations should be adopted that place an obligation on the police or other relevant authority to take appropriate steps to contact a legal aid provider as soon as practicable,<sup>125</sup> and a prohibition on interviewing a suspect or conducting any other form of procedural action involving the suspect until he or she has received legal advice from a legal aid provider.<sup>126</sup>

In some jurisdictions, regulations provide for a maximum period for waiting for legal advice to be provided, beyond which the police are permitted to proceed with interviewing the suspect or carrying out the procedural action. For example, in the Netherlands, if a lawyer does not arrive at the police station within two hours of notification, instructions from the Public Prosecutor's Office permit the police to proceed with an interrogation. Such an approach means that a suspect is denied his or her right to legal aid for reasons that are beyond his or her control, and in any event is contrary to the right conferred by the United Nations Principles and Guidelines. An alternative, preferable, approach is for regulations to require that a suspect be given the opportunity to obtain advice from another legal aid provider if the first provider contacted does not provide advice within a reasonable period of time.

#### Box 31. Access to a lawyer before interrogation—example from England and Wales

In England and Wales, if the lawyer nominated by a suspect cannot be contacted or does not attend, the suspect must be informed that he or she can consult with a lawyer from the duty solicitor scheme. An interrogation can proceed only if the suspect declines the duty lawyer and interrogation in the absence of legal advice is authorized by a senior officer.<sup>a</sup>

<sup>a</sup>United Kingdom, Police and Criminal Evidence Act 1984, Code of Practice C, para. 6.6 (c).

<sup>125</sup>In the absence of such a regulation, the court may give effect to such an obligation. For example, the Hungarian Constitutional Court, in decision No. 8/2013 (III.1), determined that a lawyer should be notified of the date and place of interrogation in a timely and verifiable manner. The practice of the police, if an interrogation was taking place at night or at the weekend, had been to notify the lawyer by fax, which meant in practice that the lawyer did not learn of the interrogation until after it had taken place. The Court held that it was inconsistent with the right to defence for a lawyer to be notified of the interrogation in a manner that excludes the possibility of the lawyer's presence at the interrogation.

<sup>126</sup>This may be subject to exceptions when, in accordance with guideline 3, para. 43 (b), there are compelling reasons for proceeding in the absence of legal advice. As noted in chapter III, section B., above, however, the circumstances in which this may be done should be explicitly set out in the regulations. There may also be exceptions, for example, in relation to taking specimens of breath or blood in road traffic cases.

The United Nations Principles and Guidelines require that adequate time and facilities be given for preparation of the defence.

#### United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>

##### Principle 7. Prompt and effective provision of legal aid

Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defence.

<sup>a</sup>General Assembly resolution 67/187, annex, para. 28.

Therefore, regulations should be adopted that place an obligation on the police or other relevant authority not to interfere with, or arbitrarily restrict, access to legal advice and assistance. (See section F for further information on guaranteeing the independence and confidentiality of legal aid providers.)

In order to ensure that legal aid is promptly provided, the obligation on the police or other relevant authority to contact a legal aid provider as soon as is practicable needs to be complemented by an obligation on legal aid providers to promptly respond to a request for legal advice or assistance. The method of doing so depends on the type of early access scheme adopted in the jurisdiction or locality. (See chapter V, section B, for information on the role of legal aid providers.)

### The right of access by legal aid providers

The right of access to legal aid can only be effective for persons held in police stations, detention centres and prisons if legal aid providers have a right of access to such places.<sup>127</sup> Therefore, to the extent that national laws do not so provide, legislation should be introduced that guarantees a prompt right of access by legal aid providers in order to provide advice and assistance to persons exercising their right to legal aid. Any conditions attached to the right of access should be limited to those which, in the particular circumstances of a case, are necessary for the purposes of security and the integrity of the investigation. Such conditions should also require authorization by a senior officer or prosecutor and be subject to a right to prompt review by a judicial officer. (See chapter III, section B, above regarding derogation from the right to legal aid.)

## F. Regulating the role of the legal aid provider

### Independence and confidentiality

The Basic Principles on the Role of Lawyers provide that Governments must ensure that lawyers are able to perform their professional functions without intimidation, hindrance, harassment or improper interference, and that lawyers must not be

<sup>127</sup>See United Nations Principles and Guidelines, principle 7, guideline 4.



identified with their clients' causes as a result of discharging their functions.<sup>128</sup> This is reflected in principles 2 and 7 of the United Nations Principles and Guidelines, cited above, and is expanded upon in principle 12.<sup>129</sup>

### United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>

#### Principle 12. Independence and protection of legal aid providers

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

<sup>a</sup>General Assembly resolution 67/187, annex, para. 36.

These requirements should be reflected in national legislation, which should provide guarantees that any communication or consultation between a suspect or accused person and his or her legal aid provider is confidential, for example, by requiring the construction of separate rooms in police stations, detention centres and prisons so that discussions between the suspect or accused person and the legal aid provider remain private.

In addition, the United Nations Principles and Guidelines provide that any legal aid body or authority administering legal aid should be free from undue political or judicial interference and be independent of the Government in making decisions regarding legal aid.

### United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>

#### Guideline 11. Nationwide legal aid system

To ensure the effective implementation of nationwide legal aid schemes, States should consider establishing a legal aid body or authority to provide, administer, coordinate and monitor legal aid services. Such a body should:

- (a) Be free from undue political or judicial interference, be independent of the Government in decision-making related to legal aid and not be subject to the direction, control or financial intimidation of any person or authority in the performance of its functions, regardless of its administrative structure;

<sup>a</sup>General Assembly resolution 67/187, annex, para. 59.

<sup>128</sup>Articles 16 and 18. With regard to confidentiality, see rule 93 of the Standard Minimum Rules for the Treatment of Prisoners (*Human Rights: A Compilation of International Instruments*, Volume I (First Part), *Universal Instruments* (United Nations publication, Sales No. E.02.XIV.4 (Vol. I, Part 1)), sect. J, No. 34), which states that "interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official".

<sup>129</sup>See also guideline 3 (United Nations Principles and Guidelines, para. 43 (d)).



Where this is not set out in legislation, national laws should be introduced to provide the necessary guarantees. Further, in order to ensure that these principles are effective, States should consider what other actions are necessary to ensure that they are respected in practice.

## G. Guaranteeing the right to early access to legal aid

### Recording, verification and oversight

Recording and verification of key actions and decisions taken in respect of early access to legal aid are essential to ensuring that the right to such access is effective in practice, identifying areas for improvement (and best practice) and enabling Governments to establish whether they are complying with their international obligations. For the suspect or accused person, such measures help to build confidence that his or her rights are being respected. For the police and other relevant authorities, recording and verification helps to protect them against false allegations of breach of due process rights. Effective recording and verification also require appropriate oversight, which may take a variety of forms. For example, police management systems may use recording and verification data to identify inadequate professional practice, systemic and procedural deficiencies, and training needs. The judiciary may use such information in determining whether evidence from police interviews should be taken into account at trial. These and other forms of oversight help to reinforce to police officers and other officials the importance of compliance with the right to legal aid and other due process rights.

However, in order for recording and verification requirements to fulfil these functions, they need to be well designed so that they do not enable the police or other relevant authority to falsely establish that the right to early access to legal aid was respected. They should not simply require self-certification by the police and other officials that they have complied with procedural requirements, but rather should, if appropriate, require confirmation by the suspect or accused person and, if relevant, his or her legal aid provider. Ideally, they should also be capable, where possible, of being cross-checked with other data. For example, the time recorded by the police as having contacted a legal aid provider may be cross-checked against the time recorded by the legal aid provider as having been contacted. In some jurisdictions, an audio or video recording must be made of some or all police interviews, and some key areas of police stations and/or detention facilities are subject to closed-circuit television (CCTV) surveillance. In those countries where such methods have been adopted, there is a common acceptance that they have significant benefits for both suspects and accused persons and the police and other officials.<sup>130</sup> However, the investment required may be beyond the capacity of some countries.

Many countries have written recording systems, but some that have such systems encounter difficulties in relating written records to particular suspects or accused persons because the records are kept in different logs or recording systems (for example, separate logs or files for arrests, detentions and requests for legal assistance). The problem may be

<sup>130</sup>See, for example, D. Dixon, *Interrogating Images: Audio-visually Recorded Police Questioning of Suspects* (Sydney, Sydney Institute of Criminology, 2007).

compounded if the logs or systems lack a common identifier or numbering system. A method adopted in some jurisdictions is to have a single record for every person who is arrested and held in police custody, in which all relevant times and actions are recorded.

Whichever method is adopted, consideration should be given to a regulation or protocol that requires the following information to be recorded in respect of each individual suspect or accused person who is arrested and/or detained at a police station or similar detention facility.

#### Essential information to be recorded

- The time of first contact between a police officer and a suspect.
- The time of arrest and/or detention, the name and identity of the officer(s) making the arrest and/or authorizing detention, and the reasons or grounds for the arrest and/or detention.
- The name and identity of the suspect or accused person.
- The actions taken to determine the age of the suspect or accused person and/or to determine any relevant vulnerability, the outcome of such actions and any further actions taken as a result of such determination.
- The time at which the suspect or accused person is notified of his or her right to early access to legal aid (and other procedural rights), the method by which he or she is informed of his or her right(s) and the decision of the suspect or accused person as to whether to exercise the right to early access to legal aid.
- If the suspect or accused person waives the right to legal aid, a record which contains sufficient detail to show that the waiver was voluntary.
- If the suspect or accused person exercises the right to early access to legal aid:
  - The actions taken by the police or other relevant official to contact a legal aid provider, the time at which such actions are taken and the outcome;
  - The time at which the legal aid provider arrives at the police station or other detention facility or otherwise makes contact and the identity of the legal aid provider;
  - The time(s) at which the legal aid provider consults with the suspect or accused person;
  - The time(s) at which the legal aid provider leaves the police station or detention facility.
- The time and duration of each police interrogation and the identity of every person present at the interrogation(s).
- The times at which any other procedural action involving the suspect or accused person take place, the name and identity of the person taking any such action and a description of the action taken, together with the outcome.
- The outcomes of the period of detention and relevant times (for example, the time of charge, production in court, release on bail or transfer to another detention facility).

#### Remedies and safeguards

Principle 9 of the United Nations Principles and Guidelines requires States to establish effective remedies and safeguards that apply if access to legal aid is undermined, delayed or denied, or if persons have not been adequately informed of their right to legal aid. States take different approaches to remedies and safeguards in respect of

breach of procedural rights. Guideline 2 suggests that these approaches may include prohibition of conducting procedural actions, release from detention, exclusion of evidence, judicial review and compensation.

### United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>

#### Principle 9. Remedies and safeguards

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

#### Guideline 2. Right to be informed on legal aid

In order to guarantee the right of persons to be informed of their right to legal aid, States should ensure that:

(e) Effective remedies are available to persons who have not been adequately informed of their right to legal aid. Such remedies may include a prohibition on conducting procedural actions, release from detention, exclusion of evidence, judicial review and compensation;

<sup>a</sup>General Assembly resolution 67/187, annex, paras. 31 and 42.

The appropriate remedy or safeguard will depend upon the nature and seriousness of the breach, the consequences or potential consequences of the breach and whether the breach can be adequately compensated for in the trial process.

### Box 32. Remedies for failure to uphold the right to legal assistance—examples from South Africa and the European Court of Human Rights

In South Africa, in common with many other countries, evidence that has been unlawfully obtained will be excluded at trial if allowing it to be used would undermine a fair trial and bring the administration of justice into disrepute. Whatever approach is taken, it is required to be “effective” and should recognize the significance of the right to legal aid, both in its own right and as an essential element of the right to a fair trial.

The European Court of Human Rights, takes the approach that failure to comply with the right to legal assistance at the investigative stage cannot normally be compensated for by other procedural protections or the adversarial nature of the trial process.<sup>a</sup>

<sup>a</sup>European Court of Human Rights, *Salduz v. Turkey*, para. 58.

While appropriate trial remedies are essential in ensuring that the right to legal aid is respected, they should be complemented by mechanisms that ensure that the right is complied with at the time that it arises. In any particular case, there may not even be a trial and, even if there is one, it may take place months, or even years, after the event in question, when it may be difficult to establish the facts. Therefore, other safeguards are essential, including appropriate training and mechanisms for ensuring transparency and accountability, such as recording requirements, supervision and oversight.

## SUMMARY OF KEY ISSUES

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1. The right to legal aid should be guaranteed in national legal systems at the highest possible level, including, where applicable, in the constitution. It is the responsibility of the State to provide legal aid at the early stages of the criminal justice process. States should enact appropriate legislation and regulations to ensure that a comprehensive system of legal aid, which is available at the early stages of the criminal justice process, is in place and is accessible, effective, sustainable, credible and appropriately funded.
2. The constitution (if relevant) and legislation should clearly set out who is eligible, and the circumstances in which they are eligible, for legal aid at the early stages of the criminal justice process. In particular, it should be specified that a person is eligible for legal aid if he or she is arrested, detained, suspected of or charged with a criminal offence punishable by a term of imprisonment or the death penalty or, in the case of any other type of offence, if the interests of justice so require, which includes circumstances in which a person is arrested or detained in respect of such an offence.
3. Legislation should make special provision, which might include mandatory legal aid, for children and other vulnerable persons, ensuring that their particular needs are adequately regulated and catered for.
4. Legislation should clearly set out the point at which the right to legal aid first arises, which should be no later than the time that a person is arrested or detained. If legislation permits derogation from the right to legal aid, it should clearly define the circumstances in which derogation is permitted, which should be confined to circumstances in which compelling reasons relating to an individual case justify derogation.
5. Legislation should require that suspects and accused persons be informed of their right to early access to legal aid without delay and in a form that may be clearly understood by them, having particular regard to the needs of children, vulnerable persons and other persons with special needs. Regulations should provide for a standard “letter of rights” and for a method of verifying that the information has been provided.
6. The process by which suspects or accused persons make a decision about whether to exercise their right to legal aid should be regulated. Such regulation should prohibit police officers and other relevant officials from seeking to dissuade suspects and accused persons from exercising their right. Consideration should also be given to other safeguards.
7. The obligation on police officers and other relevant officials to give effect to a request for legal aid should be set out in legislation, and procedures should be in place to ensure that a legal aid provider who is willing and able to provide legal aid is contacted. There should also be provisions that ensure that legal aid providers have a right of access to persons who have exercised their right to legal aid.
8. Legislation should clearly provide that a suspect or accused person is able to consult with a legal aid provider in confidence. It should also make clear that the right to legal aid includes the right to have a legal aid provider present during any interview, and that the provider is able to participate in order to protect the interests of his or her client.
9. Guarantees of the right to early access should include obligations regarding recording, verification and oversight, as well as appropriate remedies and safeguards in cases of infringement.

## IV. Organization and delivery of early access to legal aid

### A. Introduction

While a legal framework, as set out in chapter III, is necessary to ensure that the right to early access to legal aid is effective, such a framework alone is not sufficient. (See chapter III for more detail on the legal framework).

Experience in many countries shows that, even if a right to legal aid is set out in the constitution or in legislation, this will not result in suspects and accused persons having access to legal assistance in practice unless appropriate institutions, schemes and mechanisms are in place to give effect to it. Conditions vary enormously in countries around the world in terms of relative wealth, the functioning of criminal justice systems, whether they are national or federal systems, criminal procedural traditions, the professional expertise of key criminal justice personnel and the numbers of legal aid providers available to provide legal aid. What is appropriate and relevant for any particular country depends on a complex range of such factors, including the level of political will to establish such systems. Some nations have well-established systems for providing legal aid, some are in the process of establishing legal aid institutions and mechanisms, and others have none, at least at the national level.

The United Nations Principles and Guidelines recognize this diversity of conditions. While they require States to ensure that effective legal aid is provided promptly at all stages of the criminal justice process (principle 7), they are not prescriptive about how the right to legal aid is to be guaranteed in practice in any particular country. However, the United Nations Principles and Guidelines do set out some of the essential requirements for, and provide guidance on, how the right to legal aid is to be delivered.

The present chapter provides an overview of these requirements, along with examples of how they have been implemented in a number of countries. It examines the different mechanisms by which early access to legal aid can be delivered, as well as a variety of models of legal aid provision and approaches to quality assurance.

Before proceeding, two issues should be noted.

First, while the United Nations Principles and Guidelines are concerned with access to legal aid throughout the criminal justice process, the present *Handbook* deals only

with early access to legal aid. In practice, the institutions responsible for, and for delivering, early access are likely to be involved in legal aid throughout criminal proceedings (and possibly in other types of proceedings). Therefore, some aspects of this chapter relate to both “full” criminal legal aid and early access to legal aid, while others, in particular the section on how early access can be delivered, are relevant only to early access.

Second, implementing the United Nations Principles and Guidelines and delivering early access to legal aid will in some countries be a goal that could take some time to achieve. Careful consideration needs to be given to what is appropriate and what works in the context of any particular jurisdictional setting, along with what strategies are necessary to guarantee the right to early access and the period over which it is realistic to deliver them. (See chapter VII for a guide to developing strategies for early access to legal aid.)

## B. Legal aid institutions, responsibilities and funding

### United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>

#### Guideline 11. Nationwide legal aid system

To ensure the effective implementation of nationwide legal aid schemes, States should consider establishing a legal aid body or authority to provide, administer, coordinate and monitor legal aid services. Such a body should:

- (a) Be free from undue political or judicial interference, be independent of the Government in decision-making related to legal aid and not be subject to the direction, control or financial intimidation of any person or authority in the performance of its functions, regardless of its administrative structure;
- (b) Have the necessary powers to provide legal aid, including but not limited to the appointment of personnel; the designation of legal aid services to individuals; the setting of criteria and accreditation of legal aid providers, including training requirements; the oversight of legal aid providers and the establishment of independent bodies to handle complaints against them; the assessment of legal aid needs nationwide; and the power to develop its own budget;
- (c) Develop, in consultation with key justice sector stakeholders and civil society organizations, a long-term strategy guiding the evolution and sustainability of legal aid;
- (d) Report periodically to the responsible authority.

<sup>a</sup> Adopted by the General Assembly in its resolution 67/187 of 20 December 2012 (see annex, para. 59).

A number of countries have established a legal aid body invested with responsibility for administering legal aid. In some countries, this body is established by law as an independent corporate body, with a defined membership and functions. Other countries take a different approach, whereby responsibility for legal aid is retained within the relevant government ministry. Whichever model is adopted, the relevant legislation should cover the matter discussed below.

**Box 33. Legislation to establish legal aid bodies—examples from Sierra Leone and New Zealand**

The Legal Aid Board in Sierra Leone was established under the authority of the Legal Aid Act, 2012. Under the Act, Board members include a senior judge, a senior representative of the Law Officers' Department, a representative of the ministry responsible for social welfare and representatives from the bar association and a range of other organizations. Part III of the Act sets out the functions of the Board and provides that it "shall not be subject to the direction or control of any person in the performance of its functions" (section 11). The Act also provides for a secretariat to service the Board and makes specific provision for the activities of the Board to be financed by monies appropriated by Parliament, monies generated by the Board in the course of its activities, and grants and other forms of contributions made to the Board.

The New Zealand Legal Services Act 2011 vests responsibility in the Secretary for Justice for establishing, maintaining and purchasing legal aid services. Responsibility for determining applications for legal aid and similar functions are vested in a Legal Services Commissioner. The Commissioner must be an employee of the Ministry of Justice. While the Act provides that the Commissioner must act independently in relation to decisions concerning individual cases (such as eligibility for legal aid and when assigning a legal aid lawyer to an individual), in all other respects the Commissioner is required to act under the direction of the Minister of Justice (sect. 70, para. (3)).

### Allocation of sufficient funds

**United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>**

**Guideline 12. Funding the nationwide legal aid system**

Recognizing that the benefits of legal aid services include financial benefits and cost savings throughout the criminal justice process, States should, where appropriate, make adequate and specific budget provisions for legal aid services that are commensurate with their needs, including by providing dedicated and sustainable funding mechanisms for the national legal aid system.

<sup>a</sup> General Assembly resolution 67/187, annex, para. 60.

Legislation should provide for the allocation of adequate funds, or for the method by which adequate funds are to be allocated, for both the administration of legal aid and the provision of legal aid services. The method of allocation, the source(s) of the funds and the level of funding will depend upon a number of factors in any particular country. In addition to the question of what resources are available, there is an important relationship between the criteria governing eligibility for legal aid, the level of demand for legal aid and the cost of providing it. Therefore, in order to ensure that the level of funding is both adequate and appropriate, the body responsible needs to maintain information systems that enable the various factors to be identified and understood, and there needs to be flexibility so that the level of funding can be adjusted over time. Consideration should also be given to whether funds should be specifically allocated for the purposes of early access to legal aid.

### Reporting and monitoring requirements

Reporting and monitoring requirements are important, not only to ensure that money allocated for the purposes of legal aid and legal aid administration is being spent



appropriately but also, having regard to the above section, to identify what level of future funding is necessary. The process of reporting and monitoring is also important in encouraging a reflective approach to the provision of legal aid, informing strategic decision-making regarding legal aid and improving service delivery, as well as to criminal justice reform more generally. This involves routine collection of data on a range of factors, including the number of people arrested and detained, the number of requests for legal aid, the number of people receiving legal aid (by reference to, for example, age, gender and vulnerabilities), the types of cases in respect of which they are receiving legal aid (for example, the category and seriousness of the suspected or alleged offence), the service delivered (for example, advice at the police station or representation at a pretrial detention hearing), the locations where legal aid is provided, and time spent.

### Arrangements for delivering legal aid services

The arrangements for delivering legal aid services generally, and early access to legal aid in particular, will differ across different jurisdictions. The level of detail in legal aid legislation will depend upon the arrangements adopted for administering legal aid and the extent to which responsibility for delivering legal aid is devolved to the body having responsibility for legal aid. Therefore, legislation may deal with the broad strategic approach to legal aid delivery, while detailed arrangements are covered by regulations or determined by the legal aid body.

#### **Box 34. Responsibility for delivering legal aid—examples from Sierra Leone and New Zealand**

Under the Sierra Leone Legal Aid Act, 2012, the Legal Aid Board has responsibility for providing legal aid and is given the power to make agreements with legal practitioners, university law departments and non-governmental organizations for the provision of legal aid (s. 9). In furtherance of this, the Board is given wide powers to contract with such organizations to provide legal assistance and to enter into cooperation agreements with legal aid service providers (s. 10). In addition, within the parameters for eligibility set out in the legislation (s. 20), the Board has the power to determine the level of financial eligibility for legal aid and to grant legal aid in individual cases (ss. 10 and 20). In relation to early access to legal aid, the Act specifically provides that, when it is in the interests of justice, an indigent person who is arrested, detained or accused of a crime shall have access to legal advice and assistance and, where appropriate, legal representation (s. 20). The Act also requires a police officer who arrests a person who appears to be indigent to advise that person to contact the Legal Aid Board for assistance (s. 35).

Under the New Zealand Legal Services Act 2011, responsibility for determining the method(s) of delivering legal aid rests with the Secretary for Justice. The Act provides that he or she may enter into agreements with lawyers or law firms, employ salaried lawyers or contract with community legal services to provide legal services (ss. 68 and 69). The Act specifies the proceedings for which legal aid may be granted (s. 6) and establishes the eligibility criteria: it must appear to the Commissioner that the person does not have sufficient means to enable him or her to obtain legal assistance; and the offence to which the application relates must carry a maximum sentence of six months of imprisonment or more, or it must appear to the Commissioner that the interests of justice require that legal aid be granted (s. 8). The precise level of financial eligibility is set out in regulations (s. 114).

The arrangements for remunerating legal aid providers and legal aid service providers will depend upon what arrangements are adopted for delivering legal aid. The

approach to regulating remuneration arrangements generally follows the approach to determining responsibility for legal aid.

**Box 35. Remuneration for Legal Aid—example from New Zealand and Sierra Leone**

The New Zealand Legal Services Act 2011 adopts a prescriptive approach to remuneration, containing detailed provisions regarding claims for payment and the processing of those claims.

The Sierra Leone Legal Aid Act 2012, by contrast, devolves to the Legal Aid Board responsibility for determining remuneration arrangements.

### Quality of legal aid provision

While bar associations in many countries are scrupulous about establishing and enforcing appropriate professional standards, this is not always the case. In some jurisdictions, lawyers do not have to be members of bar associations or can practise unlicensed. Principle 13 of the United Nations Principles and Guidelines provides that States should put in place mechanisms to ensure that legal aid providers possess the necessary education, skills and experience that are commensurate with the nature of their work, including with regard to the gravity of the alleged offences they deal with and the needs of women, children and other persons with special needs.

The quality of legal aid provision is an important factor in ensuring both its appropriateness and its effectiveness. Legal aid legislation should establish broad responsibilities for assuring the quality of provision. (See section E below for further information on assuring quality of service).

**Box 36. Quality assurance of legal aid services—examples from Sierra Leone and New Zealand**

Under the Sierra Leone Legal Aid Act, 2012, the Legal Aid Board has responsibility for accrediting legal practitioners and other legal aid providers, as well as legal aid service providers, and is required to monitor and evaluate the quality of legal representation in legal aid cases (ss. 30 and 32). Importantly, the charging of a fee to a client by a legal aid provider is made a criminal offence (s. 37).

The New Zealand Legal Services Act 2011 contains similar, although more extensive, provisions for assuring quality (part 3, subpart 2). Legal aid providers are prohibited from making an unauthorized charge to a client in legal aid cases (s. 105). (See section E below for further information on ensuring quality of service.)

### Responsibilities towards women, children and other persons with special needs

In recognition of the special responsibilities of States for the provision of appropriate legal aid for women, children and other persons with special needs, legislation should require the person or body that has responsibility for legal aid to make special provision for such persons. The legislation may define what such provision should be, or may entrust the body that has responsibility for legal aid to determine special needs

and make provision for them (see chapter III, section B, for legislation requirements specific to groups with special needs. For a database of legal aid provision for children worldwide, see the International Juvenile Justice Observatory’s web page on legal assistance for children in conflict with the law).<sup>131</sup>

**Box 37. Special provisions in legal aid regulations—example from Afghanistan**

In Afghanistan, the Legal Aid Regulation of 2008 makes special provision for persons with special needs in access to legal aid in criminal cases. It also provides for legal aid services for women and children in civil cases.

**Defining eligibility for early access to legal aid**

Eligibility for legal aid under the United Nations Principles and Guidelines is set out in chapter III, section B, above. Normally, a person who is arrested or detained in respect of a criminal offence is entitled to legal aid without reference to his or her financial means, although this may be taken into account in some circumstances when a person is being investigated for a non-imprisonable offence. Children and vulnerable persons should have access to legal aid on the same, or more generous, conditions as other suspects or accused persons (principle 3, paras. 22 and 23).

The law in some countries does already reflect the requirements of the United Nations Principles and Guidelines. In many countries, however, legal aid legislation will require amendment in order to comply with the standards established by the United Nations Principles and Guidelines.

**Box 38. Eligibility criteria—example from England and Wales**

In England and Wales, the law provides that a person who is arrested and held in custody at a police station is entitled to consult with a lawyer, and that any such person is entitled to legal aid without reference to his or her financial circumstances. If, having been charged with a criminal offence, the person is not released on bail by the police, he or she is entitled (if he or she does not have a lawyer) to be represented by a duty lawyer at his or her first court appearance, when pretrial detention is considered.

To cater for the circumstances in which the interests of justice (“merits conditions”) and/or financial means (“means conditions”) can be taken into account, legislation should establish how eligibility is to be determined, and by whom, or should require the legal aid body to regulate the mechanisms by which eligibility is to be determined in a clear, transparent and consistent way. The application of merits and means tests at the early stages of the criminal justice process must operate in such a way that they do not prevent the right to early access to legal aid from being exercised and do not interfere with the course of the investigation or initial court hearings. This requires that it be possible for a decision to be made without delay, and must account for the fact that the person may not have ready access to information or documentation that may be needed to establish eligibility. It is not appropriate for the police or a prosecutor to determine eligibility for legal aid.

<sup>131</sup>Available from [www.ojj.org/legal/mision.html](http://www.ojj.org/legal/mision.html).

### Responsibility for raising awareness of legal aid

The duty of States to raise knowledge and awareness of rights among the population, and in particular awareness of the right to legal aid, may be most appropriately satisfied by placing such an obligation on the body responsible for delivering legal aid. The education function is possibly more difficult to satisfy where responsibility for legal aid is retained within a Government ministry. Non-governmental organizations and civil society organizations can also play an important role in awareness-raising. (See section D below for more information on the contributions NGOs and civil society can make.)

#### Box 39. Awareness raising on legal aid provision—examples from Sierra Leone and Malawi

The Sierra Leone Legal Aid Act 2012 explicitly provides that dissemination of information about legal aid is a function of the Legal Aid Board (s. 10). The Malawi Legal Aid Act also provides for such functions.

### C. Delivering early access to legal aid

Developing mechanisms for delivering legal aid at the early stages of the criminal justice process is particularly important because the right to early access is very time-sensitive. A person who has been arrested or detained is vulnerable because he or she has been removed from familiar surroundings and reference points and because he or she is subject to the control and demands of those who detain him or her. The police or other law enforcement agents are subject to a range of imperatives and pressures, such as detention time limits and prosecution targets, that often mean that they will want to proceed with the investigation as quickly as possible. Any delay in access to legal aid is likely to increase the vulnerability of the detained person, and will provide the police with a reason to proceed without the suspect or accused person having consulted with a legal aid provider.

The most effective way of making legal aid available at the early stages of the criminal justice process will depend on a range of factors, which will vary not only between countries, but also between different locations in the same country, based on the following:

- The level and predictability of demand. Busy city police stations are likely to generate consistently high demand, whereas less busy stations will not only generate lower demand, but also experience greater variations in the level of demand
- The numbers of legal aid providers in a particular location who have sufficient expertise and experience to provide legal advice and assistance at the early stages of the criminal justice process
- The willingness of legal aid providers to provide legal advice and assistance to detained suspects and accused persons, by appropriate methods and to an acceptable standard<sup>132</sup>

<sup>132</sup>There is evidence in some jurisdictions that lawyers are reluctant to attend police stations in person, and sometimes provide advice only by telephone in circumstances in which advice and assistance in person should be given.

- Whether the law permits paralegals to provide advice and assistance at police stations or other detention facilities, and whether there are paralegals with sufficient expertise and experience to provide it
- Whether the mechanisms for delivering early access to legal aid work in practice. For example, a “call-in” or “embedded” scheme may need to be supplemented by a “visiting” scheme (see below for an explanation of these terms).

There are three primary methods of delivering early access to legal aid: “call-in” schemes, “embedded” schemes and “visiting” schemes.

### Call-in and duty lawyer schemes

In a call-in scheme, a legal aid provider is contacted to provide legal advice and assistance when a suspect or accused person exercises his or her right to early access to legal aid. The success of call-in schemes depends upon effective mechanisms for ensuring that the police or other detaining authority contact a legal aid provider promptly, and upon the police knowing whom to contact and how. In circumstances in which a suspect or accused person is able to nominate a particular lawyer, this may be unproblematic, although it requires legal aid providers to make their contact details available to the police and to have arrangements in place for receiving requests outside of office hours and for providing appropriate advice and assistance at short notice. In some schemes, the police are provided with a single contact point, which may be a legal aid body or a bar association, and the nominated legal aid provider is then contacted by that body or association.

In many circumstances, a suspect or accused person will not be able to nominate a legal aid provider (because, for example, he or she has never had contact with a legal aid provider before) or the nominated legal aid provider may not be willing to provide advice and assistance. Furthermore, many legal aid schemes permit advice and assistance to be provided only by legal aid providers who are approved by, or who have a contract or other arrangement with, the legal aid body or by a public defender service.

To cater for such circumstances, many countries have established a duty lawyer scheme under which a legal aid provider is always available to provide advice and assistance to suspects or accused persons in police stations and/or at court. One advantage of duty lawyer schemes is that they avoid the problem of the police contacting compliant, or “pocket”, lawyers.<sup>133</sup> The organization of duty lawyer schemes varies: some are staffed by salaried lawyers or public defenders, and others by private legal aid lawyers who are paid in respect of time spent on duty calls and/or for periods spent on duty. In some schemes, a specified lawyer is on duty for a fixed period of time; in others, any duty lawyer may be called-in. Which type of scheme is appropriate depends on factors such as the level of demand and the availability of lawyers, but a scheme may employ different mechanisms at different times—for

<sup>133</sup>The term “pocket lawyer” is used in a number of European countries to describe lawyers who are dependent on the police for appointment and who, in return, are reluctant to challenge violations or to provide effective assistance to their clients. In Moldova, the problem has been addressed by careful regulation of the process by which lawyers are appointed at the early stage of the criminal process (M. Gramatikov and N. Hriptievski, *Impact Assessment of the Moldovan Law on State Guaranteed Legal Aid* (Soros Foundation—Moldova, 2012)). In Bulgaria, a new system of appointment of lawyers by the local bar association was introduced in 2005 to address the problem, although its success has been limited by the practice of some bar associations of simply providing a list to the police of lawyers willing to accept urgent requests for legal aid (Cape and Namoradze, *Effective Criminal Defence in Eastern Europe*, pp. 126 and 424).

example, a specified duty lawyer on call outside of office hours combined with a list system operating during office hours.<sup>134</sup> A key component of a duty lawyer scheme is that the police are under an obligation to contact the duty lawyer and that they know how to contact him or her.

**Box 40. Duty lawyer schemes—examples from Moldova, South Africa, Ukraine, England and Wales, and Israel**

Regulations in Moldova provide that, following an arrest, the police must contact the National Legal Aid Council within a maximum of one hour and that the Council must appoint a lawyer immediately, and no later than two hours from the time of the request. Outside of office hours, and in areas outside of the five cities where the Council's offices are located, the police must directly contact a lawyer participating in the duty lawyer scheme from a schedule compiled by the Council. A duty lawyer must have a contract with the Council, under which he or she is under an obligation to be available when on duty and to respond to calls promptly. Lawyers can be removed from the scheme if they fail to comply.<sup>a</sup>

Legal Aid South Africa operates a telephone advice line which is staffed by paralegals under the supervision of a qualified lawyer.

In Ukraine, the law requires the police or other law enforcement agency to inform the regional Legal Aid centre, which is then obliged (normally) to ensure that a legal aid provider attends within two hours.

In England and Wales, the police are required to contact the Defence Solicitor Call Centre, which then contacts the lawyer who is on duty.

In Israel, the Public Defence Office found that the police often justified the fact that they contacted the Office only after a suspect had been interviewed by saying that they could not contact the public defender. In response, the Office established a 24-hour duty lawyer hotline staffed by trained law students. As a result, in the first three months of operation, the number of requests for legal aid sent to the Office before suspects were interviewed increased by 50 per cent.

<sup>a</sup> Republic of Moldova, Criminal Procedure Code, art. 167, para 1/1, adopted on 14 March 2003, published in the Official Gazette No. 104-110 of 7 June 2003 and in force since 12 June 2003, and regulation of the National Legal Aid Council on the procedure for requesting and appointing a lawyer to provide urgent legal aid, approved by decision of 19 May 2009 and published in the Official Gazette, No. 114-116 of 6 July 2010. See also United Nations Office on Drugs and Crime, *Handbook on Improving Access to Legal Aid in Africa*, pp. 51 and 52, for roster schemes in a number of African countries.

A variation of the call-in scheme, which may be particularly relevant in countries where all arrested persons are entitled to legal assistance or where rules regarding eligibility are broadly drawn, is for initial advice and assistance to be provided by telephone (perhaps by a central legal call centre) and supplemented by the attendance of a lawyer at the police station when this is necessitated by the seriousness of the alleged offence or the circumstances of the suspect.<sup>135</sup> However, given the importance of the presence of a lawyer at a police station or other detention facility in supporting vulnerable suspects, ensuring that suspects' decisions are respected and deterring unlawful conduct, such schemes require careful regulation and monitoring to ensure that telephone-only advice is confined to circumstances in which it is appropriate.

<sup>134</sup> See, for example, the description of the police duty solicitor scheme in Nigeria (available from [www.opensocietyfoundations.org/voices/making-legal-aid-work-nigerias-police-stations](http://www.opensocietyfoundations.org/voices/making-legal-aid-work-nigerias-police-stations)) and in England and Wales (available from [www.justice.gov.uk/legal-aid/areas-of-work/crime/police-stations](http://www.justice.gov.uk/legal-aid/areas-of-work/crime/police-stations)).

<sup>135</sup> For information on the telephone scheme in England and Wales, see United Kingdom, Police and Criminal Evidence Act 1984, Code of Practice C, note for guidance 6B.



## Embedded schemes

In an embedded scheme, a legal aid provider is permanently located at police stations or other detention facilities, so that he or she is available to provide legal advice and assistance at any time. An embedded scheme can be particularly effective in police stations or detention facilities where there are high numbers of arrested or detained persons, where there are difficulties in ensuring that the police give effect to the right to legal aid or where suspects are unlikely to understand the significance of their right to legal aid.

### Box 41. Embedded Schemes—example from South Africa

The Centre for Criminal Justice, based at the University of KwaZulu-Natal in South Africa, runs a scheme under which paralegals are based in container offices next to police stations to provide advice and assistance to women and children who are accused of crimes or are the victims of crimes.

The advantages of embedded schemes include the fact that a legal aid provider is available at short notice to any arrested or detained person who wants to exercise his or her right to legal aid, avoiding some of the problems associated with delay. Disadvantages include the cost of having a legal aid provider permanently on duty, the potential for the legal aid provider to be (or perceived to be) overly sympathetic to the needs or demands of the police and the potentially high caseload leading to delay. Some of these disadvantages can be overcome, for example, by employing paralegals (as in the scheme in South Africa referred to above), by ensuring that legal aid providers based at police stations are rotated on a regular basis and by employing a back-up scheme when demand for legal aid is high.

## Visiting schemes

In a visiting scheme, a legal aid provider attends a police station or detention facility on a regular basis in order to provide legal advice and assistance to detainees who wish to exercise their right to legal aid. The frequency of attendance depends on the nature of the detention facility, the number of people detained, the speed with which they are released or transferred to other detention facilities and the length of time for which people are detained. For example, a police station may need to be visited on a daily basis, whereas a detention facility for pretrial detainees may need to be visited every few days or once a week. As with embedded schemes, a visiting scheme may be an effective way of facilitating the right to legal aid where there are difficulties in ensuring that the police will give effect to the right to legal aid or where suspects are unlikely to understand the significance of their right to legal aid.

### Box 42. Police station visiting scheme in Sierra Leone

Paralegals working for Timap for Justice in Sierra Leone visit police stations on a daily basis and provide assistance to detainees, including by explaining the criminal justice process, liaising with the police, helping suspects complete bail forms and locating potential sureties. They also monitor cases and help people as they move through the justice system. Ten paralegals have been able to reach about 70 per cent of all people detained in police stations in the three locations where they operate. In 50 per cent of cases, their interventions helped ensure that bail was secured. In addition, in nearly a third of cases they were instrumental in having charges dropped.<sup>a</sup>

<sup>a</sup> Open Society Justice Initiative and Timap for Justice, "Improving pretrial justice in Sierra Leone", available from [www.opensocietyfoundations.org/sites/default/files/Factsheet%20PTD%20Sierra%20Leone%20202142013.pdf](http://www.opensocietyfoundations.org/sites/default/files/Factsheet%20PTD%20Sierra%20Leone%20202142013.pdf).



Visiting schemes are particularly appropriate where legal aid is provided by public defenders or by paralegal schemes that have the resources and organizational ability to facilitate routine attendance. A major benefit is the potential for improved standards on the part of the police or detention officials because they know that they will be visited by a legal aid provider on a regular basis. A potential disadvantage is that suspects or detainees may be missed if they are arrested and processed between visits, but this deficiency can be resolved if a visiting scheme is supplemented with a call-in scheme.

## D. Models of legal aid provision

As noted earlier, the United Nations Principles and Guidelines place responsibility on States for ensuring that legal aid is provided, but they are not prescriptive as to how this is to be done. In many countries, early access to legal aid is provided by the same organizations that provide legal aid at all stages of the criminal justice process, but in others early access is provided by organizations dedicated to that function. Whichever approach is taken, legal aid at the early stages of the criminal justice process may be provided by different types of organizations operating in a variety of different ways. Below, we examine five models of legal aid provision: public defender schemes, private lawyer schemes, paralegal schemes, legal aid centre and specialist schemes and university law clinics. In practice, a number of different models may be used to deliver early access to legal aid in any particular country. Many public defender schemes use lawyers in private practice, or law students, to a greater or lesser extent in delivering legal aid services. Even in countries with a comprehensive legal aid service, specialist organizations run by NGOs or civil society organizations may provide legal aid services for persons with special needs requiring particular expertise and those from “hard to reach” groups who, for a variety of reasons, do not use mainstream services.

### Public defender schemes

In public defender schemes, legal advice and assistance are provided by lawyers (sometimes supported by paralegals or law students<sup>136</sup>) who work in specialist offices, directly or indirectly funded by national or federal Governments, civil society organizations or NGOs.

**Box 43. National Public Defender Services—examples from Chile, Georgia, Israel, the Republic of Moldova and South Africa**

Some countries, such as Chile,<sup>9</sup> Georgia, Israel, the Republic of Moldova and South Africa, have a national public defender service with offices in various locations throughout the country.

In others, especially those with a federal structure, public defender schemes are organized on a state-wide basis or, on an even more local basis. In some States where national or state governments have not taken responsibility for providing criminal legal aid services, public defender schemes are organized by civil society organizations or NGOs. In some States, legal aid may be provided by only a public defender, whereas in others legal aid may be provided by other legal aid service providers as an alternative

<sup>136</sup>For example, in Colombia, final-year law students, who are not paid, can act as public defenders.

to the public defender service, as a supplement to the public defender service in cases of conflict of interest or as a way to relieve pressure at times of high demand.

**Box 44. Supplementing public defender services with private lawyers—examples from Brazil and Israel**

In Sao Paulo state, Brazil, the office of the public defender has an agreement with the Sao Paulo Bar Association under which private lawyers who are registered for the purpose may be instructed by the office to provide legal aid services in individual cases.

In Israel, the Public Defence Office has 100 in-house public defenders, but also uses 900 lawyers in private practice to provide legal aid services.

Public defender schemes can have a number of advantages over other forms of providing legal aid. They may be more cost-effective than private practice models, although experience varies in different countries depending on a range of factors, including the efficiency of private provision of legal aid.<sup>137</sup> A public defender scheme may have the organizational ability and resources to provide such aid at the early stages of the criminal justice process even when demand is unpredictable and requires a speedy response. Given that a public defender service specializes in criminal defence, its lawyers can develop their skills and expertise to a greater extent than private lawyers who work in a number of legal fields, enhancing their career prospects. A public defender service can often be the best model for ensuring the development of specialized services for children and other vulnerable suspects and accused persons, through the provision of specialized training and skill development as a standard requirement of employment and/or a standard form of pre-service training for lawyers recruited into the service. Furthermore, as a specialist organization, a public defender service has the potential to develop a “zealous defence” culture, which in some countries is not found among private lawyers providing legal aid services. Lawyers participating in public defender schemes are also likely to be better placed than lawyers working in private practice to undertake activities that are not directly related to individual suspects and accused persons, such as working with the police to improve take-up of legal assistance and providing community education.<sup>138</sup> In several countries there is evidence that public defender services have made a significant contribution to the provision of legal aid in criminal proceedings.

However, experience in a number of countries shows that, in order for public defender schemes to provide effective criminal defence services, close attention must be paid to resources and independence. Public defender schemes in several countries have suffered from a lack of resources, resulting in high caseload levels and poor quality. One study concluded that “[t]he most significant problem plaguing countries that rely on the public defender model is that caseloads are often so large that the quality of representation suffers”.<sup>139</sup>

<sup>137</sup>There is a lack of robust evidence on the relative costs of public defender schemes compared to private practice provision. See, for example, L. Bridges and others, *Evaluation of the Public Defender Services in England and Wales* (London, The Stationery Officer, 2007); and K. Akester, *Public Defenders: Learning from the US Experience* (London, JUSTICE, 2001).

<sup>138</sup>For an evaluation of criminal legal aid, including the public defender service in the Republic of Moldova, see Gramatikov and Hriptievski, *Impact Assessment of the Moldovan Law on State Guaranteed Legal Aid*.

<sup>139</sup>T. Geraghty and others, “Access to justice: challenges, models, and the participation of non-lawyers in justice delivery”, in *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality*, Penal Reform International and Bluhm Legal Clinic of Northwestern University School of Law (Chicago, National Institute for Trial Advocacy, 2007), p. 60.

**Box 45. The need for sufficient resources for public defender service—examples from the United States and South Africa**

A study of public defender schemes in the United States, conducted at the turn of the twenty-first century by the human rights organization JUSTICE, found that nearly all of the schemes examined were under-resourced and suffered from case-overload.

In South Africa, the State legal aid budget (some of which is devoted to public defender services) increased from about \$9.5 million to over \$100 million between 1994/95 (the first year after democratic elections) and 2012/13.

Clearly, sufficient resources have to be allocated to public defender schemes if they are to give effect to the right to legal aid. This is especially true of the right to early access to legal aid since, in a context of limited resources, priority may otherwise be given to providing legal assistance and representation at the court stage of the criminal justice process.

Concerns about the independence of public defender schemes and legal aid providers working for them are important, although the dangers are sometimes exaggerated. Those who provide advice and assistance to suspects and accused persons are not simply legal technicians, and the work that they do is often perceived as challenging—to the police, and sometimes to the State. It is, therefore, crucial for guarantees of independence for public defender schemes and public defenders to be built into the laws and regulations governing them. However, the issue of independence is one that is relevant regardless of the approach that is adopted to delivering early access to legal aid. Experience in a number of countries where criminal legal aid is provided by lawyers in private practice shows that independence may be compromised by the way in which lawyers are assigned to cases, as well as by the methods of remuneration.<sup>140</sup> Provided that independence is carefully regulated, lawyers participating in public defender schemes may be better placed to resist improper influences than private lawyers who are dependent for their livelihood on the police or judiciary.

### Private lawyer schemes

In many countries, legal aid is provided by lawyers working in private law firms. There are different approaches to private lawyer schemes, but the main ones are contract schemes, ex officio or panel appointment schemes, and pro bono schemes.

#### *Contract schemes*

In contract schemes, lawyers or law firms are contracted to provide legal aid in individual cases and the contracts are normally with a legal aid body or authority, although sometimes with a public defender service. There are a variety of approaches to payment for legal aid work: payment by reference to time spent or per “item” of work, fixed fees for work relating to different stages of the criminal justice process, fixed fees per case or fees paid for conducting all cases worked on during a fixed period and/or in a certain location. Fee levels may be imposed by the legal aid body

<sup>140</sup> See, for example, Cape and others, *Effective Criminal Defence in Europe*, p. 621 (Hungary) and p. 623 (Poland); and Cape and Namoradze, *Effective Criminal Defence in Eastern Europe*, p. 246 (Lithuania) and p. 330 (Republic of Moldova).

or authority, agreed between the legal aid body and contracting lawyers or law firms (or bar associations) or determined by a system of tendering.

Each method of contracting has advantages and disadvantages. For example, fixed fees per case or group of cases will give the legal aid body a significant degree of control over expenditure, but may mean that there is little or no relationship between the amount of work required in any particular case and the fee paid. This is also the case when contracts are awarded by competitive tender, and can result in low levels of quality of service. By contrast, payment for work done, while more equitable, makes it more difficult for the legal aid body to predict or control expenditure and to verify that the work has been carried out. A tendering process may result in a lower cost to the legal aid body, but it is more difficult for the legal aid body to control the quality of legal aid provision. Tendering can also result in the legal aid body becoming dependent on a limited number of suppliers, which may have the longer-term consequence of driving up cost.<sup>141</sup> One major advantage of contracting is that it enables the legal aid body to build quality assurance requirements into legal aid contracts—for example, time limits for responding to a call and/or attending the police station, or minimum requirements for lawyers attending in person—although assessing the level of quality for these purposes can be difficult. Additionally, if specialized lawyers trained in defending children and other vulnerable groups are to be contracted, mechanisms need to be in place to verify that contracted lawyers do indeed possess the requisite skills and training, and differing fee scales may need to be applied in such cases.

### *Ex officio or panel schemes*

In *ex officio* or panel schemes lawyers are appointed to act in individual cases, normally by a prosecutor or judge who is dealing with a specific suspect or accused person. Fee levels may be set locally, or be subject to national regulation or agreement. Such schemes enable lawyers to be appointed as and when they are needed, but they have particular disadvantages in terms of delivering early access to legal aid. Judges are not normally involved at the initial stages following arrest or detention; therefore, responsibility for appointing a lawyer lies with the police or a prosecutor, and mechanisms should be in place to allow for such appointment. A police officer or prosecutor will have a direct interest in the appointment of a lawyer to advise and assist a suspect or accused person, and it is difficult to ensure that appointment decisions are made according to proper and appropriate criteria, and that such decisions are made consistently throughout a given jurisdiction. It is also more difficult to control the quality of legal aid provision, and there is evidence from a number of countries that such schemes facilitate or encourage improper relationships between lawyers and those appointing them, resulting in corruption or poor quality of legal aid provision.<sup>142</sup> Under a contracting scheme, some of these problems can be dealt with by establishing a duty lawyer scheme, but this is not possible using the *ex officio* or panel model.

<sup>141</sup>Geraghty and others, “Access to justice: challenges, models, and the participation of non-lawyers in justice delivery”, p. 64. See also R. Smith, *Legal Aid Contracting: Lessons from North America* (London, Legal Action Group, 1998), chap. 3.

<sup>142</sup>For example, a study in Hungary found that “some lawyers... ‘reside’ at police stations and their practices are based on appointment” by the police. Z. Szabo and S. Szomor, “Fegyveregyenloseg” (Equality of arms), *Redneszeti szemle* (Law enforcement review), vol. 3, 2007, p. 39.

### *Pro bono schemes*

There are a number of different types of pro bono schemes. In some countries, lawyers are under a professional obligation to undertake a number of unpaid cases every year.<sup>143</sup> In others, trainee lawyers are required to undertake a number of such cases during their training. Pro bono schemes can make a significant contribution to the provision of legal services to those who cannot afford to pay for a lawyer out of their own resources.<sup>144</sup> However, they are not a satisfactory method of delivering early access to legal aid. Lawyers who are required to advise and assist in cases without payment are often reluctant to do so, and a duty lawyer scheme is unlikely to work effectively when lawyers provide their services without charge. Furthermore, it would be difficult for the police or detention authorities to know which lawyer to contact. It would also be difficult, if not impossible, to ensure that lawyers appointed have the necessary knowledge, skills or experience to provide advice and assistance, and for quality assurance mechanisms to be operated satisfactorily.

### **Paralegal schemes**

The potential for paralegals to provide legal aid services is increasingly recognized in many regions of the world, and there is a wide range of paralegal schemes operating in countries with varying levels of development. There is no settled definition of the term “paralegal”, but essentially a paralegal is a person who is not a fully qualified lawyer who provides some or all of the services that are provided by fully qualified lawyers. The term “community-based paralegal” is used to describe paralegals who are members of the community that they serve or work for organizations that are based in that community, and who employ a range of skills and methods to reflect the concerns of, and help organize and empower, the community.<sup>145</sup>

Essentially, there are two types of paralegal schemes involved in delivering legal aid at the early stages of the criminal justice process. In the first type of scheme, paralegals perform some of the functions of lawyers, although not the full range of services, and either work with lawyers or refer cases to lawyers when work that can only be carried out by lawyers is required. In such schemes, paralegals may support the work of lawyers who are the primary providers of legal aid.

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<sup>143</sup>For example, in the Philippines the Supreme Court Rules on Legal Assistance require lawyers to undertake a minimum of 60 hours pro bono work a year, and lawyers are given tax incentives under the Free Legal Assistance Act 2010 to do additional hours.

<sup>144</sup>See, for example, National Pro Bono Resource Centre, *National Law Firm Pro Bono Survey: Australian Firms with Fifty or More Lawyers—Final Report* (University of New South Wales, 2013).

<sup>145</sup>See generally the Kampala Declaration on Community Paralegals, available from [www.namati.org/news/newsfeed/kampala-declaration](http://www.namati.org/news/newsfeed/kampala-declaration); Open Society Justice Initiative, *Community-based Paralegals: A Practitioner's Guide* (New York, Open Society Institute, 2010); and United Nations Office on Drugs and Crime, *Handbook on Improving Access to Legal Aid in Africa*, pp. 31-37. For an evaluation of a paralegal scheme in Sierra Leone, see P. Dale, *Delivering Justice to Sierra Leone's Poor: An Analysis of the Work of TIMAP for Justice* (Washington, D.C., World Bank, 2009) (available via <http://documents.worldbank.org/curated/en/home>). For a description of a paralegal pilot scheme in Rwanda, see Penal Reform International, *Paralegals in Rwanda: A Case Study by Penal Reform International* (January 2012), available from [www.penalreform.org/publications/paralegals-rwanda-case-study](http://www.penalreform.org/publications/paralegals-rwanda-case-study).

**Box 46. Paralegal schemes—examples from the United States and Sierra Leone**

For example, The Bronx Defenders in New York employs paralegals to act as investigators, community advocates or community organizers in order to provide “holistic defence to fight both the causes and consequences of involvement in the criminal justice system”.<sup>a</sup>

In the schemes run by Timap for Justice in Sierra Leone and the Paralegal Advisory Service in Malawi, paralegals attend police stations, other detention facilities and courts, and act as observers and provide information to suspects and accused persons but do not provide advice and assistance. Cases are passed on to a lawyer when further legal assistance, such as representation in court, is necessary.

<sup>a</sup> See [www.bronxdefenders.org/our-work/holistic-defense](http://www.bronxdefenders.org/our-work/holistic-defense).

In the second type of paralegal scheme, paralegals perform all of the functions that a lawyer can perform, at least in relation to certain stages of the criminal justice process. For example, in England and Wales there is a well-established system of “accredited” representatives (paralegals), normally employed by a law firm, who provide legal aid to suspects at police stations and who are permitted to act as police station duty lawyers. If a client is charged with a criminal offence, the case is then passed on to a lawyer to represent the client in court.<sup>146</sup>

Paralegal schemes can deliver early access to legal aid by means of call-in or duty lawyer schemes, although this depends on legal recognition that paralegals can perform (some of) the functions of lawyers, but they are particularly suited to visiting schemes since, at least if the paralegals are employed by an NGO or community-based organization, they are not dependent on fees paid in respect of individual clients. Paralegal schemes have particular advantages in countries, or locations, where there is an insufficient number of qualified lawyers who are willing and able to deliver early access to legal aid. In addition, such schemes, particularly those which are community-based, may be more suited than lawyer-based schemes to carrying out more innovative work associated with early access to legal aid. Paralegals are likely to be closer to the communities they serve—in terms of upbringing, culture and economic and social status—and thus may be more effective in providing information or advice in a form that clients are likely to understand, in identifying and securing the cooperation of witnesses and sureties, and in securing diversion from the formal criminal justice process.

However, for paralegal schemes to be effective in delivering early access to legal aid of sufficient quality, close attention needs to be paid to a number of factors which are identified in guideline 14 of the United Nations Principles and Guidelines.

<sup>146</sup> Information on accredited representatives (paralegals) is available from [www.justice.gov.uk/downloads/legal-aid/crime-categories-of-law/policerepsinfo-june2008-v2.pdf](http://www.justice.gov.uk/downloads/legal-aid/crime-categories-of-law/policerepsinfo-june2008-v2.pdf).



### United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>

#### Guideline 14. Paralegals

States should, in accordance with their national law and where appropriate, recognize the role played by paralegals or similar service providers in providing legal aid services where access to lawyers is limited.

For this purpose, States should, in consultation with civil society and justice agencies and professional associations, introduce measures:

- (a) To develop, where appropriate, a nationwide scheme of paralegal services with standardized training curricula and accreditation schemes, including appropriate screening and vetting;
- (b) To ensure that quality standards for paralegal services are set and that paralegals receive adequate training and operate under the supervision of qualified lawyers;
- (c) To ensure the availability of monitoring and evaluation mechanisms to guarantee the quality of the services provided by paralegals;
- (d) To promote, in consultation with civil society and justice agencies, the development of a code of conduct that is binding for all paralegals working in the criminal justice system;
- (e) To specify the types of legal services that can be provided by paralegals and the types of services that must be provided exclusively by lawyers, unless such determination is within the competence of the courts or bar associations;
- (f) To ensure access for accredited paralegals who are assigned to provide legal aid to police stations and prisons, facilities of detention or pretrial detention centres, and so forth;
- (g) To allow, in accordance with national law and regulations, court accredited and duly trained paralegals to participate in court proceedings and advise the accused when there are no lawyers available to do so.

<sup>a</sup> General Assembly resolution 67/187, annex, paras. 67-78.

### *Recognizing the role of paralegals*

Guideline 14 encourages States to recognize the role played by paralegals, to ensure access for accredited paralegals to police stations and detention facilities and to allow properly trained paralegals to participate in court proceedings when no lawyers are available to do so. Some States do give legal recognition to paralegals. In most States, however, there is no formal recognition of paralegals, and action is needed to give effect to guideline 14.

#### **Box 47. Recognizing the role of paralegal—examples from Sierra Leone and England and Wales**

In Sierra Leone, the Legal Aid Board has a statutory power to accredit paralegals for the purposes of providing legal aid.<sup>a</sup>

In England and Wales, the law recognizes that accredited paralegals must, subject to certain exceptions, be treated in the same way as lawyers for the purpose of providing legal aid at police stations, and they are entitled to payment under the legal aid scheme.<sup>b</sup>

<sup>a</sup> Sierra Leone, Legal Aid Act 2012, sect. 9, subsect. 2, and sect. 30, subsect. 1.

<sup>b</sup> United Kingdom, Police and Criminal Evidence Act 1984, sect. 66 and Code of Practice C, para. 6.12.



### *Determining the functions of paralegals*

Guideline 14 provides that States should introduce measures to specify the type of legal services that can be provided by paralegals and the type of services that must exclusively be provided by lawyers. The type of services that can be provided by paralegals should reflect both the need for legal aid services, the ability—in terms of knowledge, skills and experience—of paralegals to provide those services, and the level and quality of available supervision. The long-established Paralegal Advisory Service in Malawi uses a “functional” approach to determine “which services lawyers alone can best provide, which services non-lawyers alone can best provide, and which services lawyers and non-lawyers working together can best provide”.<sup>147</sup> This approach may be appropriate in any jurisdiction. In respect of early access to legal aid, experience from a number of countries shows that suitably trained and supervised paralegals can provide effective legal advice and assistance (and carry out associated functions) to persons arrested and detained in police stations or detained in other detention facilities. Most countries do not permit paralegals to appear in court and therefore do not allow them to make procedural motions connected with an investigation or to make an application for pretrial release. However, in circumstances in which a suspect or accused person would otherwise be unrepresented, the case for enabling paralegals to represent that person is strong. Where paralegals are not permitted to appear in court, consideration should be given to how the information obtained, and the actions taken, by a paralegal are conveyed to the lawyer providing representation in court.

### *Training and accreditation of paralegals*

It is important that suspects and accused persons advised and assisted by paralegals not be at a disadvantage compared with those assisted by lawyers. In recognition of this, guideline 14 provides that States should introduce measures to ensure that paralegals are appropriately trained and supervised, operate under the supervision of qualified lawyers and are subject to appropriate quality standards. States should also promote a code of conduct that is binding on all paralegals.

#### **Box 48. Accreditation of paralegals—examples from Sierra Leone, South Africa and England and Wales**

In Sierra Leone as noted above, the Legal Aid Board has the power to accredit paralegals for the purpose of providing legal aid services.

In South Africa, paralegals normally hold a paralegal diploma from a university or an undergraduate degree that includes law modules.

In England and Wales, paralegals are not permitted to provide legal aid services at police stations (other than during a probationary period) unless they are accredited. In order to be accredited, they must pass tests designed to assess their knowledge, skills and ability to apply those skills.<sup>a</sup>

<sup>a</sup> The accreditation scheme is jointly regulated by the Solicitors Regulation Authority and the Legal Services Commission. Details are available from [www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation.page](http://www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation.page). For different approaches to training paralegals see Open Society Justice Initiative, *Community-based Paralegals: A Practitioner's Guide*, chap. 5.

<sup>147</sup> Geraghty and others, “Access to justice: challenges, models, and the participation of non-lawyers in justice delivery”, p. 82.

### Legal aid centres and specialist schemes

In many countries, legal aid centres and specialist schemes, generally run by NGOs or civil society organizations, deliver legal aid for suspects, accused persons and others. Some, especially in countries that do not have a comprehensive legal aid system, act as legal aid providers for all people who need legal aid services in a particular locality, and some such organizations have developed an extensive network for providing such services. In addition to providing legal aid services, such centres and schemes can play an important role in demonstrating the need for a comprehensive legal aid service. They can also be very effective in developing innovative ways of delivering legal aid services and, in so doing, can stimulate the improvement of service delivery by other legal aid service providers.

#### Box 49. Justice Center for Legal Aid in Jordan

The Justice Center for Legal Aid in Jordan is a not-for-profit NGO whose objective is to help provide poor and vulnerable people with access to the justice system. The Center is committed to facilitating access to justice, empowering communities and effecting systemic change through representation, advocacy and outreach work. It provides services through 10 legal aid clinics and aims to cover all regions of Jordan before the end of 2013. It has established a pro bono lawyers' network and has conducted several studies to document the level of demand for legal aid services in Jordan.<sup>a</sup>

<sup>a</sup> See <http://jcla-org.com> for more information.

Some legal aid centres and specialist schemes focus on delivering legal aid to particular sections of the community, especially persons who have special needs, suffer particular disadvantage or who are “hard to reach”. In doing so, they may deliver services not only to suspects or accused persons, but also to victims, and they often aim to ensure that criminal cases are dealt with outside of the formal criminal justice system.

In a range of countries, schemes supported by UNDP, the United Nations Population Fund and UNICEF provide legal aid services for women, children and persons with other special needs, such as prisoners suffering from chronic diseases or elderly prisoners.

#### Box 50. Specialist legal aid schemes—examples from Togo and Zimbabwe

In Togo the Group for Reflection and Action: Women, Democracy and Development employs lawyers and paralegals to assist both suspects and victims, including in police stations.

The CATCH legal assistance programme in Zimbabwe focuses on providing legal aid and other services to children.<sup>a</sup> CATCH is a voluntary organization that provides legal assistance to children who find themselves in conflict with the law. All child clients are assigned a legal officer and a social worker, who seek to limit the child's contact with the justice system while increasing his or her access to social and child protection services. Where appropriate, bail is applied for; CATCH identifies a carer who is willing and able to take responsibility for the child or, if this is not possible, who is willing to negotiate monetary bail. A case plan is developed, and a CATCH legal officer meets with the prosecutor in order to seek the child's release. In the first year of operation, CATCH was able to negotiate an out-of-court disposal in 65 per cent of cases.

<sup>a</sup> For other specialist schemes in Africa, see United Nations Office on Drugs and Crime, *Handbook on Improving Access to Legal Aid in Africa*, chap. V.

In countries that do not have a comprehensive system for delivering early access to legal aid, legal aid centres and specialist organizations can play an important role in ensuring that at least some sections of the community have access to legal aid. However, the United Nations Principles and Guidelines place primary responsibility on the State to ensure that a comprehensive legal aid system is in place (principle 2), so such centres and organizations should not be used as a substitute for States fulfilling their responsibilities. Principle 14, however, provides that States should recognize and encourage the contribution of civil society and other groups in providing legal aid. Even where a comprehensive legal aid system does exist, such organizations and groups can play an important role in catering for persons with special needs and in innovating effective ways of delivering legal aid.

### University law clinics

The United Nations Principles and Guidelines provide that States should, where appropriate, encourage and support the establishment of legal aid clinics in universities and facilitate the involvement of students in delivering legal aid services by developing student practice rules and facilities for legal internships in courts.

#### United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>

##### Guideline 16. Partnerships with non-State legal aid service providers and universities

States should, where appropriate, also take measures:

- (a) To encourage and support the establishment of legal aid clinics in law departments within universities to promote clinical and public interest law programmes among faculty members and the student body, including in the accredited curriculum of universities;
- (b) To encourage and provide incentives to law students to participate, under proper supervision and in accordance with national law or practice, in a legal aid clinic or other legal aid community scheme, as part of their academic curriculum or professional development;
- (c) To develop, where they do not already exist, student practice rules that allow students to practise in the courts under the supervision of qualified lawyers or faculty staff, provided that such rules are developed in consultation with and accepted by the competent courts or bodies that regulate the practice of law before the courts;
- (d) To develop, in jurisdictions requiring law students to undertake legal internships, rules for them to be allowed to practise in the courts under the supervision of qualified lawyers.

<sup>a</sup> General Assembly resolution 67/187, annex, para. 72.

In many countries there are university law clinics in which law students, appropriately trained and supervised, provide legal aid services in respect of criminal cases. Also worth noting is the use of law students by public defender organizations and in embedded schemes for delivering early access (referred to earlier in this section).

**Box 51. Legal aid clinics in universities—examples from the United States, Africa and South-East Asia**

In the United States, there are at least 147 law school clinical programmes, one third of which provide criminal defence services.<sup>a</sup>

In Africa, law clinic programmes are found in universities in many countries, including Ethiopia, Kenya, Mozambique, Nigeria, Sierra Leone and South Africa, and many of these operate in the criminal justice field.<sup>b</sup>

In South-East Asia, the Bridges Across Borders South-East Asia Community Legal Education Initiative supports the establishment of university law clinics.<sup>c</sup>

<sup>a</sup> American Bar Association, *Directory of Law School Public Interest and Pro Bono Programs*, available from <http://apps.americanbar.org/legalservices/probono/lawschools>.

<sup>b</sup> United Nations Office on Drugs and Crime, *Handbook on Improving Access to Legal Aid in Africa*, pp. 29-30.

<sup>c</sup> See [www.babseacle.org](http://www.babseacle.org) for more information.

University law clinic programmes have a number of advantages. They are less expensive than some other methods of delivering legal aid services, and they can help to promote a public service ethos in prospective lawyers which may remain with them throughout their careers. However, the use of university law clinics to deliver early access to legal aid is problematic (except when they are used for specific functions, such as staffing a duty lawyer call centre), especially if they are used in conjunction with a call-in scheme. Call-in schemes require the ability to respond to requests for legal assistance promptly, at any time of the day or night, and for the legal aid provider to spend the amount of time that is necessary given the needs of the suspect or accused person and the nature of the alleged crime or the investigation. Furthermore, providing legal advice and assistance at police stations or other detention facilities can be very demanding, not only in terms of the level of skills and legal expertise required, but also because the working environment can be very challenging. The suspect or accused person may be vulnerable, and the police may display antipathy towards a legal adviser. A university clinic scheme may work well, however, when early access is provided by a visiting scheme, demands in terms of time and location are more predictable and students are more likely to be closely supervised by lawyers or law lecturers.

## E. Assuring quality of service

The importance of quality assurance in delivering effective access to legal aid is recognized by principle 13 of the United Nations Principles and Guidelines, which requires States to put in place mechanisms to ensure that all legal aid providers possess the education, training, skills and experience that are commensurate with the nature of their work.

### United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>a</sup>

#### Principle 13. Competence and accountability of legal aid providers

States should put in place mechanisms to ensure that all legal aid providers possess education, training, skills and experience that are commensurate with the nature of their work, including the gravity of the offences dealt with, and the rights and needs of women, children and groups with special needs.

<sup>a</sup> General Assembly resolution 67/187, annex, para. 37.

Guideline 15 sets out guidance on accreditation, discipline and oversight of legal aid providers, and guideline 16 provides that States should, in consultation with civil society organizations, justice agencies and professional associations, establish quality standards and monitoring and evaluation mechanisms for legal aid service providers.

The approach to quality assurance will depend upon how legal aid, and specifically early access to legal aid, is organized and delivered. In particular, it will depend upon whether: (a) there is a legal aid body responsible for administering legal aid; (b) whether there is a contracting relationship between the legal aid body and legal aid, and legal aid service, providers; and (c) whether legal aid is provided through a public defender service.

In view of the wide variation in approaches to the organization and delivery of legal aid, it is not appropriate to be prescriptive in describing how quality assurance should be approached. In countries where legal aid services are provided under contract, quality standards can be built into the contracts and contractual mechanisms can be used to ensure that legal aid services are delivered in accordance with those standards. A similar approach can be taken where legal aid services are provided by a public defender service. In the absence of such arrangements, quality assurance may be left to bar associations and individual legal aid service providers, which is often not satisfactory.<sup>148</sup> Nevertheless, whatever types of arrangements for delivering legal aid exist, it is possible to describe the kinds of quality assurance mechanisms that should be considered, making a distinction between those which are relevant to legal aid service providers and those which may apply to legal aid providers.

### Legal aid service providers

In considering the standards that may be required of legal aid service providers, a distinction can be made between service delivery standards and organizational (or management) standards. The relevance of any particular standard will depend upon the mode of delivering early access to legal aid. For example, response times will be relevant to call-in schemes but not to visiting schemes, whereas ethical and quality standards will apply to both types of schemes.

<sup>148</sup>In some countries, membership of a bar association is not mandatory, and most bar associations do not have professional standards that are specifically relevant to early access to legal aid.

### *Service delivery standards*

With regard to service delivery standards, the following aspects should be considered:

- *Compliance with ethical standards:* Legal aid service providers should not interfere with the professional judgement of lawyers and paralegals employed by the service provider in determining what advice and assistance to give in individual cases. Lawyer-client confidentiality must be respected, and the legal aid service provider should regard itself as being bound by the same rules of confidentiality as apply to the legal aid providers who work for it
- *Accepting cases:* Requests for legal advice and assistance must be accepted unless there is a specified reason for not doing so, with such reason to be recorded in writing
- *Response times:* Given the time sensitivity of early access to legal aid, legal aid service providers should work to defined standards relating to the time within which calls for legal advice and assistance are responded to. This is particularly relevant to call-in schemes, and may be expressed as follows: in x per cent of calls, a response (by telephone or in person) must be made within y minutes
- *Method by which advice and assistance are given:* Advice and assistance must be provided in person unless there is a specified reason for not doing so, with such reason being recorded in writing
- *Written records:* Written records must be kept of all requests for legal aid and of action taken and, when legal aid is provided, of all relevant information. Consideration should be given to requiring the use of approved pro forma documents (see chapter V on the role and responsibilities of legal aid providers in that regard)
- *Continuity of representation:* Consideration should be given to requiring legal aid service providers to provide continuity of representation so that, in the absence of specified reasons, the service provider, having accepted a case, continues to provide legal aid to the person until the case is completed
- *Prohibition on charging fees to legal aid clients:* No fee is to be charged to a client in a legal aid case, except when this is permitted by relevant legislation or regulations

### *Organizational standards*

With regard to organizational standards, the following aspects should be considered:

- *Employment of appropriately qualified staff:* The legal aid service provider must employ appropriately qualified staff, and assign cases to them that are commensurate with their qualifications, knowledge and experience
- *Conditions of service (salary, pension, benefits etc.):* The legal aid service provider should endeavour to provide conditions of service that are, at a minimum, comparable to those available in the prosecution service and commensurate with the services they provide in order to ensure that it is able to attract and retain high-calibre staff
- *Personal supervision and support:* Staff must be routinely supervised by a person who has the necessary qualifications, knowledge and experience to provide



such supervision, and other appropriate mechanisms for supporting staff must be provided. Supervision should include the review of a selection of cases worked on by the relevant staff member

- *Training:* A mechanism must be in place to determine the training needs of staff, and appropriate training should be provided on a regular basis, having particular regard to the need to develop the knowledge and skills necessary to providing legal aid at the early stages of the criminal justice process, including for children and other persons with special needs (for a training curriculum for legal aid providers, see annex I to the present document)
- *Case files:* A procedure must be in place to store case files for a specified period of time and to enable file retrieval (for example, to cater for “repeat” clients and to enable conflicts of interest to be identified)
- *Caseloads:* Mechanisms should be in place to ensure that staff do not have responsibility for an excessive number of “live” cases, taking into account their qualifications and experience and the complexity and seriousness of the cases<sup>149</sup>
- *Quality of case work:* Mechanisms should be in place to assure and monitor the quality of work performed in individual cases. For example, some legal aid bodies impose a requirement that legal aid service providers submit a number of cases, or case files, for peer review.<sup>150</sup>

### *Legal aid providers*

Legal aid providers who are lawyers may be subject to the professional standards of the bar association or other professional body to which they belong, and in some countries this is regulated by law. However, in some countries, lawyers are not required to be a member of a bar association, and they are not subject to an obligation to comply with professional standards. Where bar associations do exist and do have a disciplinary function in relation to quality, there is considerable variation in the extent to which they effectively regulate quality. Legal aid providers who are not lawyers are not normally subject to a professional conduct regime. For these reasons, consideration should be given to incorporating quality standards for legal aid providers into any contracting, duty lawyer or other appointment scheme. Such standards include the following:

- *Compliance with a code of conduct:* Legal aid providers should be required to comply with a professional code of conduct. If there is no relevant code of conduct for lawyers, or if legal aid providers who are not lawyers are not covered by any lawyers’ code of conduct, consideration should be given to establishing an appropriate code of conduct. This may include provisions on the following duties: protecting the interests of clients; acting with integrity and independence; acting impartially and avoiding discrimination; meeting obligations to other parties, such as prosecutors and the courts; respecting

<sup>149</sup>The American Bar Association has adopted caseload standards, but there is concern that these standards have not been respected in practice (N. Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense* (Chicago, American Bar Association, 2011); available from [www.americanbar.org/content/dam/aba/publications/books/ls\\_sclaid\\_def\\_securing\\_reasonable\\_caseloads.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf)).

<sup>150</sup>For the peer review scheme in England and Wales, see [www.justice.gov.uk/legal-aid/quality-assurance/audits/peer-review](http://www.justice.gov.uk/legal-aid/quality-assurance/audits/peer-review). Legal aid authorities in Scotland and the Netherlands also operate a system of peer review, as does the public defender service (La Defensoría) in Chile.



client confidentiality; not acting when there is a conflict of interest (including conflicts between clients and conflicts between a client and the legal aid provider); not offering or accepting payments (except where payments are permitted by law); and not bringing the profession into disrepute<sup>151</sup>

- *Competence:* Consideration should be given to ensuring that legal providers do not take cases that are beyond their capabilities in terms of knowledge, skills and experience
- *Training:* Consideration should be given to requiring legal aid providers to undergo relevant training on a regular basis in order to improve their knowledge and skills and to ensure that their knowledge of relevant law and procedure is up to date and appropriate to the needs of those to whom they provide legal aid (see annex I)
- *Quality assurance:* Consideration should be given to requiring legal aid providers to submit their work for the purposes of quality assurance, as required by the relevant legal aid service provider or legal aid body
- *Child protection:* In countries where relevant child-protection legislation on safeguarding and vetting exists, legal aid providers who provide legal aid to children should be vetted.

## SUMMARY OF KEY ISSUES

1. The United Nations Principles and Guidelines set out the responsibilities of States and provide guidance regarding the delivery of legal aid, including with regard to the following:

- The establishment of a legal aid body or authority responsible for providing, administering, coordinating and monitoring legal aid services
- Provision for an adequate and specific budget for legal aid services commensurate with need
- Measures to enable paralegals to provide legal aid services to the extent allowed for by national law
- Mechanisms for ensuring the competence and accountability of legal aid providers
- Mechanisms for monitoring and evaluating the provision of legal aid.

2. The establishment of a dedicated national body responsible for administering legal aid should be considered, and provided for in legislation. Such a body should have responsibility for:

- Allocating sufficient funds
- Reporting to the Government, or to another monitoring body, on the delivery of legal aid services and the expenditure of funds for this purpose

<sup>151</sup>See, for example, the Code of Professional Conduct for Counsel adopted by the International Criminal Court, in its resolution ICC-ASP/4/Res.1 of 2 December 2005, available from [www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCASP432Res1\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCASP432Res1_English.pdf).

## SUMMARY OF KEY ISSUES (CONTINUED)

- Making arrangements for the delivery of legal aid
  - Making arrangements for assuring the quality of legal aid services
  - Ensuring that the particular needs of children and persons with special needs are adequately catered for
  - Defining and determining eligibility for legal aid
  - Raising public awareness of legal aid.
3. Early access to legal aid may be delivered by a variety of schemes, the choice of which depends on a range of circumstances, including the level and predictability of demand, the number of available qualified lawyers, whether the law permits paralegals to provide legal aid services and the extent to which existing mechanisms are effective in delivering early access to legal aid.
4. Schemes for delivering early access to legal aid include:
- Call-in and duty lawyer schemes, under which a legal aid provider is called in when a suspect or accused person has exercised his or her right to legal aid or when, in the case of a duty lawyer scheme, a legal aid provider is on duty to provide legal aid when needed
  - Embedded schemes, under which a legal aid provider is located at police stations or other detention facilities
  - Visiting schemes, under which a legal aid provider attends police stations or other detention facilities on a regular basis.
5. There are a number of models of legal aid provision which may be used, alone or in combination, to deliver legal aid in relation to criminal proceedings, the most suitable being:
- Public defender schemes
  - Private lawyer schemes
  - Paralegal schemes
  - Legal aid centres and specialist schemes
6. Mechanisms need to be in place to assure the quality of legal aid provision. The approach to quality assurance depends on a range of factors, including the model or models of legal aid provision that have been adopted in a particular country. Separate arrangements should be made for assuring the quality of legal aid service providers and the quality of the services of legal aid providers.

## V. Role and responsibilities of legal aid providers

### A. Introduction

The Basic Principles on the Role of Lawyers set out the duties of lawyers in broad terms:

- To advise clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to those rights and obligations
- To assist clients in every appropriate way, taking legal action to protect their interests
- To seek to uphold human rights and fundamental freedoms
- To loyally respect the interests of their clients.<sup>152</sup>

These serve as an important general statement of the role of legal aid providers. However, it is important to articulate the role and functions of legal aid providers in delivering early access to legal aid in more detail because, for a number of reasons, providing legal advice and assistance to suspects and accused persons in police custody, or in other detention facilities, involves a number of particular challenges.

People who are arrested or detained are, as a result of that fact, in a vulnerable situation. Their vulnerability may be made worse, however, by their personal circumstances or the conditions in which they are detained, and this may manifest itself in a number of ways. Suspects or accused persons are likely to be worried about the circumstances in which they find themselves, may not understand why they have been detained or what may happen to them, may be suffering from ill health or the consequences of being physically or mentally abused or may be experiencing the effects of drug or alcohol abuse. If the person is a child, or has special needs, he or she will be even more vulnerable. As a result, the suspect or accused person may be suspicious of or hostile towards a legal aid provider, may exhibit challenging and unpredictable behaviour or may be withdrawn or unable to understand what the legal aid provider is trying to do or what the provider is saying, as well as unable to understand the significance of the advice given by the provider.

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<sup>152</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.3, annex, principles 13-15.

The police or other officials involved in a person's detention may be hostile to the presence of or intervention by the legal aid provider, may treat the legal aid provider without respect or may simply try to ignore the provider altogether. On occasion, they may even be threatening towards to the legal aid provider. Even if the police or other officials accept that a suspect or accused person has a right to early access to legal aid, they may be reluctant to provide information and may be unwilling (and sometimes unable) to provide information about the alleged offence, the evidence that they have or the likely course of events. Furthermore, the legal aid provider is on the territory of the police (or the detention authority), subject to their agenda and normally isolated from the support of colleagues or his or her employer.

The legal aid provider may be unsure of what he or she can do to defend the rights and interests of his or her client, particularly during the initial period following the introduction of laws governing the right to early access to legal aid. Even though the law may provide for a right to early access, it may not be clear on what that right entails. There may be no clear rules, for example, on what information must be given to the legal aid provider, whether the provider can be present during interviews of his or her client and, if so, whether and to what extent the provider can intervene. While ideally such matters should be covered in the law or regulations, the legal aid provider has to deliver early access in the context of the rules as they exist in his or her jurisdiction. (See chapter III for further information on the essential legislative framework for early access to legal aid.)

The present chapter provides a general statement of the role of the legal aid provider in delivering early access to legal aid, and then considers the responsibilities of the legal aid provider in performing that role. The focus is on the personal obligations of the legal aid provider, rather than on the obligations of the legal aid service provider. It is recognized that the precise responsibilities of the legal aid provider will depend upon, and may be constrained by, the laws that apply in any particular country. The responsibilities of the provider will also depend upon the point of intervention, whether that occurs during the time that a suspect or accused person is detained at a police station or at some later point, such as when the suspect or accused person is already in pretrial detention. The present chapter concentrates on the responsibilities of the legal aid provider when providing legal aid to people in police custody, but the principles may be adapted, as appropriate, for legal aid providers giving advice, assistance or representation to people in other forms of custody or at a later stage of the criminal justice process.

## B. Role of the legal aid provider

There is no internationally agreed statement of the specific role of the legal aid provider at the early stages of the criminal justice process. The following statement is consistent with and seeks to give effect to the Basic Principles on the Role of Lawyers and the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems as they apply in the context of early access to legal aid.

### **The role of legal aid providers in delivering early access to legal aid**

The role of legal aid providers in delivering early access to legal aid is to protect and advance the rights and legitimate interests of their clients. In doing so, the legal aid provider must:

- Loyally respect, and take any necessary actions to further, the interests of their clients, having particular regard to their age, gender, nationality or ethnicity, mental or physical disability, or sexual orientation
- Seek to ensure that their clients know and understand their rights
- Seek to ensure that their clients are treated with dignity, that their human rights are respected and that they are treated in accordance with the law
- Provide advice and assistance to and, as appropriate, representation for their clients, taking into account their particular needs and any relevant vulnerabilities
- Seek to ensure that decisions of their clients are respected
- Challenge, in an appropriate way, any unlawful or unfair treatment of their clients
- Seek to ensure that their clients continue to receive legal advice, assistance and representation until their case is finally disposed of, including in any appeal.

Consideration should be given to enshrining a statement of the role of legal aid providers in law or regulations governing early access to legal aid, in relevant professional codes of conduct and/or in contracts for legal aid provision. Action should be taken to ensure that police officers, detention officials, prosecutors and judges are made aware of and understand that statement.<sup>153</sup>

### C. Responsibilities of legal aid providers

In carrying out the role as defined above, a legal aid provider should take the steps outlined below, which are broadly set out in chronological order. This is intended as a guideline rather than a fixed agenda for action, since what may be appropriate or possible will depend upon the type of early access scheme, the legal and organizational constraints that apply in a particular country and the stage at which the legal aid provider becomes involved.

#### Responding to a request for legal aid

In a call-in scheme, a legal aid provider may be notified of a request for legal aid by telephone, fax or some other means of communication. The legal aid provider should respond quickly and appropriately.

A quick response is necessary for two reasons. First, having exercised his or her right to legal aid, the suspect will not know, and normally will not be told by the police, what has happened in response to that request. Delay will increase his or her vulnerability. The suspect may doubt that that he or she will receive legal aid, particularly if he or she has not been arrested or detained previously or if the right to legal aid

<sup>153</sup>For example, the Moldovan Union of Lawyers has published a practical guide for defence lawyers, which includes guidance on the responsibilities of lawyers in providing legal advice and assistance at the early stages of the criminal process. See *Avocatul Poporului* (The People's Lawyer), vols. No. 3-4, 2012, p. 10; available (in Romanian) from [www.avocatul.md/files/documents/avocatului%20poporului%203-4.pdf](http://www.avocatul.md/files/documents/avocatului%20poporului%203-4.pdf). For the standards adopted for the purpose of the police station accreditation scheme in England and Wales, see Solicitors Regulation Authority, "Standards of competence for the accreditation of solicitors and representatives advising at the police station". Available from [www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation.page](http://www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation.page).

has only recently been introduced, or may believe that delay will prolong the period spent in detention (a belief that may be encouraged by the police). As a result, the suspect may change his or her mind about exercising the right to legal aid.<sup>154</sup> Second, delay may be used by the police as a reason to proceed with an interview without the suspect having received legal advice. In some countries this is facilitated by legal rules that establish a maximum time that the police have to wait for legal aid to be provided before being able to proceed with an interview. (See chapter III, section E, for examples and a discussion on how such time limits have been addressed.)

An appropriate response refers to the method by which legal advice and assistance are provided (in particular, whether by telephone or in person), which should correspond to the needs and circumstances of the suspect (for example, if the suspect is a child or otherwise vulnerable), the nature and seriousness of the suspected offence or offences and contextual factors, including the prevalence of ill-treatment or bribetaking by the police. Lawyers may be reluctant to attend the police station in person, or may be tempted to make the decision whether to attend in person by reference to inappropriate criteria, such as whether the request is made outside of office hours. It is suggested by some lawyers that attending the police station is not necessary if it is possible to advise a suspect on the telephone to exercise his or her right to silence. Providing legal advice and assistance in this way is normally not adequate (except perhaps when a suspect is arrested or detained in respect of a minor offence) for a number of reasons. Many suspects find it difficult to remain silent in the face of police questioning, and the police may use psychological, and sometimes physical, pressure to undermine that right. While the right to silence is commonly accepted as an international standard that is reflected in domestic laws, exercising that right often has adverse consequences in practice, such as prolonging detention, making pretrial detention more likely and being interpreted as evidence of guilt.<sup>155</sup> In any event, a suspect may need advice and assistance on a range of matters, and not just on how he or she should respond in an interview.

When first speaking to the client, the legal aid provider should explain who he or she is, what his or her role is and that he or she is independent of the police. It cannot be assumed that a client, particularly if the client has not previously been arrested or detained, or has not previously consulted with a legal aid provider, is aware of the role of the legal aid provider. The legal aid provider should also give appropriate information about confidentiality. Guideline 3 of the United Nations Principles and Guidelines provides that States should introduce measures to ensure that confidentiality of all such communications is guaranteed, but in practice the legal aid provider will need to make an informed judgement about whether the right to confidentiality is likely to be respected. (See chapter III, section F, on the protection of independence and confidentiality through legislation.)

### Gathering relevant information

The legal aid provider should gather information from the police, or other investigative authority, and the client, and may also need to gather information from others.

<sup>154</sup>For research evidence from England and Wales which demonstrates the effects of delay, see V. Kemp, “‘No time for a solicitor’: implications for delays on the take-up of legal advice”, *Criminal Law Review*, vol. 3, 2013. p. 184.

<sup>155</sup>Studies in Europe show that exercise of the right to silence often has such consequences in practice. See Cape and Namoradze, *Effective Criminal Defence in Eastern Europe*, p. 430.

### *Information from the police*

The legal aid provider should seek to obtain from the police:

- Information about the reasons for, and circumstances surrounding, the arrest and/or detention. The right of an arrested person to be informed of the reason for arrest is an international standard reflected in the International Covenant on Civil and Political Rights (art. 9, para. 2) and in most regional human rights instruments.<sup>156</sup> The obligation under the United Nations Principles and Guidelines to ensure that legal aid is effective and that legal aid providers are given access to the case files of detained persons<sup>157</sup> means that this information should also be supplied to the legal aid provider who is providing legal aid to an arrested or detained person. This information should not be limited to the legal grounds for arrest, but should extend to the factual basis for the use of powers of arrest or detention.<sup>158</sup> Information about the circumstances surrounding the arrest or detention is necessary to enable the legal aid provider to consider how the client came to be arrested or detained and whether the client may be at risk while in detention (for example, if the arrest or detention was accompanied by violence on the part of the client and/or the police). In addition, information should be obtained about the time of the arrest and/or detention.
- Information concerning what is known by the police or other authorities about the suspect. This will include information that is relevant to whether the suspect is vulnerable, and also whether the suspect has previous convictions or is wanted in respect of other suspected crimes.
- Information about the evidence that is already in the hands of the police or other authorities, and the likely course of the investigation. As noted above, the United Nations Principles and Guidelines provide that legal aid providers should be given access to the case file of the detained person, although both international courts and domestic laws have adopted a more limited approach to what is required to be disclosed during the early stages of the criminal justice process.<sup>159</sup> In any event, the legal aid provider should seek to obtain as much information as possible about the evidence in order to be able to provide appropriate advice to the client, including as to what approach to take in any interrogation. Information about the likely course of the investigation is necessary to enable the legal aid provider to give the client an indication of what is likely to happen while he or she is in detention, and how long detention is likely to last.

<sup>156</sup>For example, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, para. 2; and the American Convention on Human Rights, art. 7, para. 4.

<sup>157</sup>See United Nations Principles and Guidelines, principles 2 and 7.

<sup>158</sup>See, for example, European Court of Human Rights, *Nechiporuk and Yonkalo v. Ukraine*, Application No. 42310/04, Judgement of 21 April 2011, para. 209.

<sup>159</sup>For example, while the European Court of Human Rights has held that the prosecution authorities should disclose to the defence all material evidence for and against the accused (European Court of Human Rights, *Edwards v. United Kingdom*, Application No. 13071/87, Judgement of 16 December 1992), there is no specific case law clarifying at what point the information should be disclosed. However, the Court has held that the accused should be given access to those documents in the investigation file that are essential in order to effectively challenge the lawfulness of pretrial detention (European Court of Human Rights, *Mooren v. Germany*, Application No. 11364/03, Judgement of 9 July 2009). This is reflected in the European Parliament and Council of the European Union directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings, art. 7, para. 1.



### *Information from the client*

The legal aid provider should seek to obtain from the client:

- Information about his or her personal circumstances, and any particular concerns that he or she may have. Information about the personal circumstances of the client is necessary to enable the legal aid provider to determine whether the client has any particular vulnerabilities, and what action should be taken in respect of them. (See the following section for the responsibilities of legal aid providers in determining vulnerabilities.) The legal aid provider will also be able to cross-check this information with any information given to him or her by the police or other detention authorities. The legal aid provider should carefully consider, together with the client, what information, if any, should be passed on to the police or other authorities. It is important for the legal aid provider to ascertain any particular concerns that the client may have, since this may mean that the client is particularly vulnerable to falsely confessing. For example, a parent who is concerned about young children left without care, or a drug addict who needs his or her next “fix”, may think (and may be encouraged by the police to think) that a confession will lead to speedy release.<sup>160</sup>
- Information about the circumstances of the arrest or detention. This will enable the legal aid provider to cross-check this information with information provided by the police or detention authorities. It may help the provider to make a judgement about the strength of the prosecution case, and also about whether the client is fully aware of the seriousness of the situation and whether he or she is fully and accurately disclosing information to the legal aid provider.
- Information about the alleged offence or offences. How this is obtained depends on a range of factors, including the circumstances and intellectual capacity of the client, but it is important that the legal aid provider try to ensure that the client feels confident in disclosing all relevant information to him or her. While the client may need to be guided as to what information is relevant, the legal aid provider should take care not to influence the accuracy or truthfulness of the information provided. In obtaining information from the client, the legal aid provider should have in mind the legal definition of any suspected (or other potential) offence, any possible defences and what may be relevant to mitigation (in the event that the client admits guilt). Where relevant, the legal aid provider should explore with the client what evidence may exist, or may be obtained, that is supportive of innocence, as well as any potential witnesses.

### *Gathering other relevant information*

Whether the legal aid provider is able to gather potential evidence at the early stages of the criminal justice process depends upon domestic law and professional conduct rules, and also upon the remuneration arrangements for legal aid work. It also depends upon the length of the investigative phase. Even in countries where legal

<sup>160</sup>For false confessions generally, see G. Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook*, Wiley Series in the Psychology of Crime, Policing and Law (Chichester, West Sussex, Wiley, 2003).

aid providers are permitted to gather evidence, they normally have no powers to do so. In countries where it is permitted, the legal aid provider should consider what evidence, if any, it is appropriate to gather or preserve—for example, by interviewing a potential witness or requesting preservation of CCTV footage.

When appropriate, the legal aid provider should try to obtain information relevant to, or identify and make contact with people who may be able to assist in, an application for release pending trial. This might include, for example, an employer who can confirm employment details of the suspect or a person who is willing to stand as a surety.

### Determining vulnerabilities and special needs

The legal aid provider should ascertain, and take appropriate action in respect of, any vulnerabilities or special needs of the client. (See chapter II, section B, for an overview of international instruments that provide guidance on making accommodations for groups with special needs.) The legal aid provider should:

- Verify whether the client is a child. Principle 11 of the United Nations Principles and Guidelines provides that legal aid for children should be prioritized, in the best interests of the child, accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children. It is an obligation on the police and/or prosecution to make an initial determination at the earliest stages of an investigative process as to whether a suspect is a child, and to proceed accordingly. However, it is also the responsibility of a legal aid provider to verify that determination and, in cases in which the available evidence is unclear as to whether a client is a child, to remind the police or other relevant person that they are obliged to treat his or her client as a child until a definitive determination is made.

When a client is a child, guideline 10 provides that:

He or she is entitled to a lawyer who represents the child in his or her own name where there is, or could be, a conflict between the interests of the child and his or her parents;

He or she must be able to contact his or her parents or guardian at once;

No interview by the police or other authorities may take place in the absence of the child's legal aid provider and a parent or guardian;

Information on legal rights must be provided in a manner that is appropriate for the child's age and maturity, and in a manner that is gender- and culture-sensitive;

Diversion from the formal criminal justice system should be considered;

The use of alternatives to deprivation of liberty should be encouraged, and deprivation of liberty should be used only as a last resort;

Appropriate measures should be adopted in judicial proceedings to ensure that they are conducted in an atmosphere and manner that allows the child to be heard.

The legal aid provider should seek to ensure that these provisions are complied with, and should take appropriate action when they are not. When necessary, the legal aid provider should liaise with social and other relevant services.

- Determine whether the client understands and can speak the language of the proceedings and can read any relevant document(s). A number of provisions of the United Nations Principles and Guidelines are designed to ensure that a suspect who cannot understand or speak the relevant language is not disadvantaged in the provision of legal aid (principle 10) or information as to rights (guideline 2) or in relation to the investigative process (guideline 3).<sup>161</sup> In particular, guideline 3, paragraph 43, provides that foreign detainees and prisoners should be informed in a language that they understand of their right to request contact with their consular authorities without delay, and should be provided with the services of an independent interpreter when necessary and the translation of documents when appropriate.<sup>162</sup>
- The legal aid provider should ascertain whether the client can understand and speak the relevant language (including whether he or she has a hearing disability) and seek to ensure that appropriate action is taken to cater for any inability to do so. Since States are under an obligation to ensure that legal aid is effective (principle 7), interpretation should be made available so that the legal aid provider and the suspect can effectively communicate.<sup>163</sup>
- Determine whether the client has any other relevant needs or vulnerabilities. A suspect may have special needs for a range of reasons, including as a result of age, gender, ethnicity, physical or mental disability, mental illness, HIV/AIDS or other serious contagious disease, or drug use, or because he or she is from an indigenous or aboriginal group or is a migrant, a refugee or asylum seeker, an internally displaced person or a foreigner. Suspects may also be vulnerable if they have young children who will not be cared for while they are detained.

The legal aid provider should ascertain whether the suspect is vulnerable or has special needs for any of these reasons and take appropriate action in terms of both the way in which he or she provides advice and assistance and the way in which the suspect is dealt with by the authorities. In the case of female suspects, guideline 9 of the United Nations Principles and Guidelines provides that active steps should be taken to ensure, where possible, that a female lawyer is available to assist female accused persons and defendants.

<sup>161</sup>With regard to children, the Convention on the Rights of the Child, art. 40, para. 2 (vi), provides that States should ensure that children in conflict with the law have the free assistance of an interpreter if the child cannot understand or speak the language used. General Comment No. 10 (2007) on children's rights in juvenile justice of the Committee on the Rights of the Child recommends that this assistance should not be limited to the trial but should also be available at all stages of the child justice process (CRC/C/GC/10, para. 62).

<sup>162</sup>According to article 36 of the Vienna Convention on Consular Relations and rule 38 of the Standard Minimum Rules for the Treatment of Prisoners, detained persons of foreign nationality have the right to consular assistance when taken into custody. The Inter-American Court of Human Rights has mentioned in this regard that a consul "may assist the detainee with various defense measures, such as providing or retaining legal representation, obtaining evidence in the country of origin, verifying the conditions under which the accused is being held in prison". (See advisory opinion OC-16/99 of 1 October 1999 on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, issued by the Inter-American Court of Human Rights, Series A No. 16, para. 86).

<sup>163</sup>The European Parliament and Council of the European Union directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings, in its article 2, paragraph 2, provides that interpretation of communications between a suspect or accused person and his or her lawyer in direct connection with any questioning during the proceedings must, when it is necessary for the purpose of safeguarding the fairness of the proceedings, be provided at State expense.

### Checking the legality of actions taken by the police and authorities

It is the responsibility of the legal aid provider to check the legality of the actions taken by the police and other authorities in respect of a client and to take appropriate action to safeguard the client's rights and interests.<sup>164</sup> This includes determining the legality of the decision to arrest and to detain the client, the treatment of the client by the police or other authorities, the conditions and length of the detention and any investigative action taken by the police or authorities (including the conduct of any interview), as well as working to ensure compliance with the law governing production before a prosecutor or a judicial authority. Where written or virtual presentation of a case before a court is permitted by national law, the legal aid provider should try to ensure that all relevant information is put before the court.

The action to be taken in respect of any unlawful action depends on the nature of the illegality and the laws governing remedies in a particular country. Generally, however, if a legal aid provider is aware of any illegality, he or she should bring it to the attention of the relevant authority even if it is unlikely to be remedied at the time. Legal aid providers should also consider the value of strategic litigation where unlawful practices are systemic.

### Advising the suspect

Principle 3 of the United Nations Principles and Guidelines provides that the right to legal aid applies at all stages of the criminal justice process, and guideline 3 indicates that this includes the period before any interview by the police or other authority and during any interview. (See chapter III, section B for further information on when the right applies.) Therefore, the responsibility of legal aid providers to provide advice and assistance applies before, during and after any interview by the police or other authority. However, it is recognized that some States have not yet introduced laws which satisfy these requirements and, in particular, that some do not yet permit a legal aid provider to provide legal advice and assistance to clients during police interviews.

#### *Advising before an interview*

When advising a client before an interview takes place, the legal aid provider should consider what advice to give in respect of:

- The client's legal position, including the law governing the suspected offence or offences and any other offence that the legal aid provider believes to be relevant to the apparent evidence. This should include advice on the apparent strength of the evidence and any relevant defences
- Any other investigative acts that the police or authorities have indicated that they will carry out, or that the legal aid provider believes they may carry out, for example, personal or property searches or the taking of fingerprints or DNA samples

<sup>164</sup>For a State's responsibilities in this respect, see guideline 4 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

- The existence of, and consequences of exercising, the right to silence. This will depend upon the law of the country concerned, but the advice should cover not only the formal consequences, but also the implications of exercising any such right in practice
- Whether to answer police questions or to provide any statement, which will depend upon a range of factors, including the apparent strength of the evidence, the facts as provided by the client, the availability of any defence and the consequences of answering or failing to answer questions
- What is likely to happen during the interview, including the formal rules that apply to interviews, the nature of the questions that are likely to be asked, what strategies might be adopted by the interviewer, how the client should conduct himself or herself during the interview and whether the client is entitled to stop the interview to obtain further legal advice.

Advice should be given in a form that is appropriate to the client and in a way that can be understood by him or her. The legal aid provider should test whether the client understands the advice given and the likely consequences of that advice.

### *Advising during an interview*

The responsibilities of a legal aid provider during an interview will depend, in part, on whether and how interviews are regulated in a particular country. The overall objectives of the legal aid provider during an interview are to protect and advance the rights and interests of the client and to ensure that the client is treated with dignity and that any decisions taken (for example, as to whether to answer questions) are respected. In particular, the legal aid provider should:

- Be aware of tactics designed to undermine the legal aid provider's advice or the position of the client
- Try to ensure that the interviewer(s) act(s) lawfully and fairly
- Protect the client against unfair or unlawful questioning or conduct
- Try to ensure that the client says what he or she wishes to say or, if he or she has decided to exercise the right to silence, that he or she remains silent
- Try to ensure that the interview is accurately recorded and, if the interview is summarized by the interviewer, that the summary accurately reflects both the questions that were put to the client and the client's replies.

The extent to which the legal aid provider may intervene, and the manner of any intervention, will depend partly upon domestic laws and regulations governing legal advice and assistance during interviews by the police or other authorities. The provider should seek to take all necessary and appropriate action to protect the client's rights and interests within such constraints.<sup>165</sup>

<sup>165</sup>There is extensive literature, particularly from the United States, on police interviewing strategies. See, for example, F. E. Inbau and others, *Criminal Interrogation and Confessions* (Burlington, Massachusetts, Jones and Bartlett Learning, 2013). In some countries, regulations or official guidance govern police interviewing, and there is also case law on the limits of permissible interviewing techniques and strategies. For guidance for lawyers on advising and assisting suspects in police interviews in England and Wales, see Ed Cape, *Defending Suspects at Police Stations: Practitioner's Guide to Advice and Representation*, 6th ed. (London, Legal Action Group, 2011), especially chapter 7.

### *Advice after an interview*

After any interview, the legal aid provider should try to discover what action the police or other authorities intend to take, for example, further investigation, further interview of the suspect, the bringing of charges or production before a court. The provider should also consider whether to ask the police or investigating authority to pursue particular lines of enquiry or to interview particular witnesses.

The legal aid provider should seek another consultation with his or her client, possibly to review and evaluate the interview and to advise the client of the likely course of the investigation and prospects of further detention. The provider should consider what action the police are likely to, or may, take after the client has left the police station or detention facility and, in particular, whether the police are likely to attempt to interview the client in the absence of the legal aid provider or to subject him or her to pressure or ill-treatment, and advise the client accordingly. If the client is to be further detained, the legal aid provider should advise the client how he or she may be contacted and thereafter ensure that a regular check is made on the progress of the investigation and detention.

### **Making appropriate representations**

The representations a legal aid provider should consider making will depend in part on who is in charge of the investigation and whether relevant decisions are made by the police or by a prosecutor. This, in turn, will depend upon how crime investigation is regulated in the particular country and whether the police or prosecutor have the power to impose out-of-court disposals. Depending on the jurisdiction and the circumstances, the legal aid provider should consider making representations regarding:

- The future course of the investigation and whether particular enquiries should be pursued
- Any decision regarding the bringing of charges (if this is a part of criminal procedure in the country concerned) or production before a prosecutor or judge
- Bail or unconditional or conditional release pending trial
- Diversion from the criminal justice system or out-of-court disposals.

### **Liaising with the client's family and others**

Depending on the circumstances, the wishes of the client and the nature of the alleged offence (for example, domestic violence), the legal aid provider should liaise with the client's family or other relevant people, such as community leaders or employers. The purpose is to ensure that they have been informed of the arrest or detention and of the likely course of events, including any pending court appearance. They may also have a role to play in providing relevant evidence, finding relevant witnesses or supporting any application for release pending trial, for example, by acting as sureties.

### **Ensuring representation at subsequent court hearings**

The right to early access to legal aid is defined to include representation at pretrial hearings, particularly at hearings where a decision is made about pretrial detention. Where relevant, the legal aid provider should ensure that the client is represented at



such a hearing and that, if the client is to be represented by a different legal aid provider, that provider is given all relevant information in the possession of the initial provider. At any pretrial detention hearing, the legal aid provider should seek to ensure that the court is provided with all relevant information and that any decision is made in accordance with the law. When the legal aid provider believes that a detention decision is unwarranted or not in accordance with the law, he or she should consider what courses of action are open to the client, advise the client accordingly and take any necessary action to secure his or her release.

### Recording information

The legal aid provider should keep a record of all relevant information that arises while providing advice and assistance. This includes:

- Information concerning the client
- All relevant times, for example, the times of arrest and detention, of consultations, of interviews, the times that the police or detention authority were contacted by the legal aid provider and the times that the legal aid provider attended the police station or detention facility
- Instructions taken from the client
- Advice given by the legal aid provider and any actions taken or representations made
- What was said during any interview
- Other investigative actions conducted by the police or investigating authorities, and their outcomes
- Any relevant decision made by the police, investigating authority, prosecutor or court.

## SUMMARY OF KEY ISSUES

1. The role of the legal aid provider in delivering early access to legal aid is to protect and advance the rights and legitimate interests of his or her clients.
2. In carrying out their role, legal aid providers must:
  - Loyal respect, and take any necessary actions to further, the interests of their clients, having particular regard to the client's age, gender, ethnicity or sexual orientation
  - Seek to ensure that their clients are treated with dignity, that their human rights are respected and that they are treated in accordance with the law
  - Provide advice and assistance to and, as appropriate, representation for, their clients, taking into account their particular needs and any relevant vulnerability
  - Seek to ensure that decisions of their clients are respected



- Challenge, in an appropriate way, any unlawful or unfair treatment of their client
- Seek to ensure that clients continue to receive legal advice, assistance and representation until their case is finally disposed of, including in any appeal.

3. The role of the legal aid provider should be incorporated into regulations governing early access, relevant professional codes of conduct and/or contracts for legal aid provision. Action should be taken to ensure that police officers, detention officials, prosecutors and judges are made aware of, and understand, that role.

4. The responsibilities of legal aid providers in carrying out their role in respect of early access to legal aid include:

- Responding to requests for legal aid quickly and appropriately
- Gathering relevant information from the police, the client and other relevant sources
- Determining any vulnerabilities or special needs of the client, including by verifying whether he or she is a child; determining whether the client speaks or understands the language of the proceedings and whether he or she can read any relevant documents; determining whether the client has any other relevant vulnerability, and taking any appropriate action
- Checking the legality of actions taken by the police or other relevant authority, and taking appropriate action in the event of a breach
- Advising and assisting clients before, during and after any interview
- Making appropriate representations to the police or other relevant authority
- Liaising with the client's family and/or third parties (subject to the consent of the client)
- Ensuring representation at any subsequent court hearing, and particularly at a pretrial detention hearing
- Recording all relevant information.



## VI. Roles and responsibilities of the police, prosecutors and judges

### A. Introduction

While legal aid providers and legal aid service providers have a crucial role in delivering early access to legal aid, the right to early access to legal aid cannot be effective without the cooperation of, and appropriate procedures being followed by, the police and other investigative authorities, prosecutors and members of the judiciary. This is recognized by the United Nations Principles and Guidelines, which require States to ensure that effective legal aid is promptly provided at all stages of the criminal justice process (principle 7), to ensure that information is provided about that right (principle 8), to ensure that access to legal aid is facilitated (principle 7) and to establish effective remedies and safeguards where access to legal aid is undermined, delayed or denied (principle 9). Underlying these obligations is the requirement that States, and State officials, actively support and respect the rule of law.

The present chapter examines the particular roles and responsibilities of the police, prosecutors and the judiciary in ensuring the effectiveness of the right to early access to legal aid. It is recognized that the precise methods by which States comply with these obligations is a matter for individual Governments, so the present chapter is intended primarily as a guide to the roles and responsibilities that should be provided for and, where appropriate, regulated. Cross reference should be made, where relevant, to chapter III of the present *Handbook*, on the essential legal framework of the right to early access.

### B. Role and responsibilities of the police and other investigative authorities

The police, other investigative officers and detention facility officers have a critical role in ensuring the effectiveness of the right to early access to legal aid. The suspect or accused person is in their custody and is dependent on them to be informed of the right to early access (and often to understand the significance of that right), to be able to make an informed and independent decision about whether to exercise that right and to be able to make contact with an appropriate legal aid provider. If the legal aid provider is to provide effective advice and assistance, he or she is

dependent on the police to provide timely and accurate information about the grounds for arrest and the reasons for detention, and to facilitate timely and confidential access to the suspect or accused person.

The right to early access to legal aid will not be effective if these actions and decisions are simply left to individual officers. An individual officer may not be aware of the legal provisions regarding the right to early access. Even if the officer is aware of those provisions, a range of cultural and organizational factors may discourage him or her from fully respecting and facilitating the exercise of that right. Police and other law enforcement officers are subject to a range of organizational incentives and imperatives, and are normally process-driven. Therefore, police authorities and other investigative and detention authorities need to provide clear instructions to officers on how to give effect to the right to early access, and devise processes, procedures and recording mechanisms that are designed to give effect to that right. These might include:

- Standard language for notifying suspects and accused persons of their right to early access to legal aid,<sup>166</sup> with instructions on how to adapt the notification of rights for children and other vulnerable persons;
- A clear procedure for giving notification of the right to early access, and for recording the decision made;
- A clear and workable procedure for contacting a legal aid provider;
- Clear rules about the limitations on proceeding with investigative actions, such as interviewing the suspect, in the absence of legal advice;
- A review of organizational processes and incentives, to ensure that they encourage officers to respect and facilitate the right to early access;
- The use of monitoring and supervisory mechanisms so that it is possible to identify and appropriately deal with any failures to facilitate early access to legal aid. Mechanisms may include internal procedures, such as the monitoring of custody records by senior officers and/or police inspectorates or the appointment of officers as human rights “champions”, and external procedures such as police station visiting schemes.<sup>167</sup>

An important element of ensuring the effectiveness of the right to early access to legal aid is training for police officers in relation to that right, designed to ensure that officers understand the relevant law and the significance of that right, including the benefits of early access for their work (see chapter II, section C, for examples of the benefits of access to legal aid). Experience from a number of countries demonstrates that training involving role play, as well as joint training with legal aid providers, can be very effective. For a training curriculum for police officers, see annex II.

<sup>166</sup> See the European Union model letter of rights in annex IV, and also the Letter of Rights used in Scotland, available from [www.scotland.gov.uk/Topics/Justice/legal/criminalprocedure/letterofrights](http://www.scotland.gov.uk/Topics/Justice/legal/criminalprocedure/letterofrights).

<sup>167</sup> See, for example, Association for the Prevention of Torture, *Monitoring Police Custody: A Practical Guide* (Geneva, 2013). In the Philippines, for example, a human rights officer is based at each police station, and both individual officers and police stations are given “star ratings” for human rights compliance.

### Role of police

The role of police officers (and other relevant officials) in respect of early access is to ensure that the right to early access to legal aid is respected in practice. In carrying out this role, police officers must take appropriate action to:

- Ensure that suspects and accused persons are notified of the right to early access in a form that they can understand, having regard in particular to the special needs of children and people from other vulnerable groups;
- Ensure that suspects and accused persons are able to take an informed and voluntary decision about whether they wish to exercise that right;
- Notify a legal aid provider without delay (when a suspect or accused person wishes to exercise their right to legal aid);
- Facilitate the provision of legal aid to a suspect or accused person who wishes to exercise that right.

### Responsibilities of police

In carrying out their role, the police (and other relevant officials) have the following responsibilities.

#### *Identifying whether a suspect or accused person is a child or otherwise vulnerable*

Procedures should be in place to ensure that officers take appropriate action as soon as is practicable following the arrest or detention of a suspect or accused person to determine whether that person is a child, or otherwise vulnerable, or has special needs. When such a determination has been made, the officer should take appropriate action (see chapter II, section B, for further guidance on identification of persons with vulnerabilities).

#### *Informing suspects and accused persons of their right to early access to legal aid*

The procedure for notifying suspects and accused persons of their right to early access to legal aid should include:

- *When notification is to be given:* This will depend on the law governing arrest and detention in a particular country, but normally it should be given as soon as practicable following arrest or detention, and no later than the time of arrival at a police station or other detention facility. Since the right to legal aid is a continuing right, notification should be given again at the commencement of any interview, and each time that a suspect or accused person is transferred from one police station or detention facility to another.
- *Who gives the notification:* This will depend upon the law and procedure in a particular country, but notification is more likely to be effective if responsibility is given to an identifiable officer, for example, the officer responsible for detaining a suspect or accused person at a police station or other detention

facility. Responsibility to repeat the information should also be placed on any officer who interviews a suspect or accused person.

- *To whom the notification is given:* Notification should always be given to the suspect or accused person. In addition, if domestic laws provide for independent adults to be called in to assist children or other vulnerable suspects or accused persons, notification should also be given to such persons.
- *How the notification is to be given:* This will depend upon the law and procedure in a particular country, but it is normally appropriate that information be given both orally and in writing and, where appropriate, in the form of pictures. Consideration should be given to a requirement that a suspect or accused person be given the right to keep the written notification so that, if the person initially waives the right, he or she has a written reminder. Alternatively (or in addition), notices of the right should be placed in appropriate locations, such as in cells and/or common areas where suspects or accused persons are detained.
- *The wording of the notification:* The notification should be given in simple terms that can be understood by the majority of suspects or accused persons. Special provision should be made for suspects and accused persons who do not speak the language in which the notification is given, and for children and others who are vulnerable.
- *What should be included in the notification:* This will depend upon the law and procedure in a particular country, but the notification should include information on the right to legal advice and assistance, the fact that such assistance is confidential and independent, the right to legal aid, who will provide legal advice and assistance (for example, a duty lawyer or a public defender) and how legal advice and assistance will be arranged.

Notification of the right to early access to legal aid may be included in any notification of other rights, such as the right to silence and the right to have another person informed of the arrest or detention.

### *Enabling a suspect or accused person to make a voluntary and informed decision*

Officers should be given guidance on how to determine whether a suspect or accused person understands the right to early access, and what information to give if the person is uncertain about whether to exercise the right (see chapter III, section D, on the protection of informed consent and waiver of the right). Officers must not attempt to persuade a suspect or accused person to waive his or her right to early access, and must not try to influence that person to choose a particular legal aid provider.

### *Contacting a legal aid provider*

There should be a clear procedure governing how an officer is to contact a legal aid provider (when a suspect or accused person has exercised the right to early access to legal aid), and it should require the officer to do so without delay. This procedure should be developed in consultation with the legal aid body if one exists or with relevant legal aid service providers, so that officers know whom to contact and how to contact them.

### *Limits on interviewing following a request for legal assistance*

Guideline 3 of the United Nations Principles and Guidelines provides that, when a suspect or accused person has exercised the right to legal aid, an interview should not commence in the absence of a legal aid provider unless: (a) there are compelling reasons for proceeding with an interview; or (b) the person gives their informed and voluntary consent to waive the lawyer's presence, with such consent to be appropriately verified (see chapter III, section B, for information on what may and may not be considered a compelling reason and chapter III, section D, on the protection of informed consent and waiver of the right). Both possibilities require clear regulation so that officers know when they may proceed with an interview, and the appropriate authorization and verification procedures to be followed. Verification may be in the form of a written and signed statement of the suspect or accused person and/or written authorization by a senior officer.

### *Providing information to the legal aid provider*

Officers should be required to give to a legal aid provider advising and assisting a suspect or accused person such information as is required by law. In addition to information about the reasons and grounds for arrest or detention, subject to domestic law, this should include such information about the investigation of the alleged offence(s) as is necessary to enable legal aid to be effective.

### *Facilitating access by the legal aid provider*

Officers should be required to permit access by the legal aid provider to the suspect or accused person, and to facilitate confidential consultation between them. Officers should not seek to impose restrictions on the length or number of consultations. In accordance with guideline 3 of the United Nations Principles and Guidelines, officers should be required to permit a legal aid provider to be present in any interview of the suspect or accused person, and at any other procedural action at which the suspect or accused person is required or permitted to attend. In addition, officers should be required to permit a legal aid provider to intervene during an interview or other procedural action in order to protect the interests of his or her client, and to provide confidential advice (if necessary, by interrupting the interview or procedure) if so desired (see chapter III, section E, for further information on the obligation of officers to connect the accused and legal aid providers and chapter III, section F, on protecting the independence and confidentiality of legal aid providers).

### *Imposing no pressure on the legal aid provider*

In accordance with principle 16 of the Basic Principles on the Role of Lawyers, and principle 12 of the United Nations Principles and Guidelines on Access to Legal Aid, officers should be prohibited from interfering with legal aid providers in delivering early access to legal aid and from placing them under any improper pressure (see chapter III, sections E and F).

### *Recording and monitoring*

Procedures should be in place to enable and require officers to record all significant decisions and actions that relate to the right to early access to legal aid (see



chapter III, section G, for requirements of and devices for record-keeping). Such records should include:

- Time, date, place and grounds and reasons for arrest
- Time, date, place and grounds and reasons for detention
- Time, date and place of actions taken to determine whether the suspect or accused person is a child, is otherwise vulnerable or has special needs, the outcome of such determination and the action taken as a result
- Time, date and place of notification of the suspect or accused person of his or her right to early access to legal aid, and the information given
- Decision made by the suspect or accused person as to exercise of the right to early access to legal aid, and the time and date the decision was made
- If the suspect or accused person has exercised the right to early access to legal aid, the actions taken to give effect to that decision, together with relevant times
- Time of first contact by the legal aid provider and the time that the legal aid provider attended the police station or detention facility (if different)
- Times of all consultations between the legal aid provider and the suspect or accused person
- Times and duration of all interviews and whether the legal aid provider was present at any interview
- If the suspect or accused person has exercised the right to early access, the grounds for conducting any interview in the absence of a lawyer, the consent of the suspect or accused person and authorization by a senior officer (if relevant).

Procedures should be in place for the routine monitoring of the conduct of officers in respect of the right to early access to legal aid.

### C. Role and responsibilities of prosecutors

The involvement of prosecutors at the early stages of the criminal justice process varies across jurisdictions. In some jurisdictions, prosecutors have little or no involvement at the investigative stage and become involved only at the stage when a person is charged with a criminal offence or a decision is made to proceed with a prosecution. In others, the police or other investigative agencies are responsible primarily for conducting an investigation, but are required to notify a prosecutor of certain actions taken (for example, detention beyond a certain period of time) and/or to seek the permission of a prosecutor in order to conduct certain investigative actions (for example, to search property). In yet other jurisdictions, prosecutors have primary responsibility for conducting some (often the more serious) or all criminal investigations. Therefore, the responsibilities of prosecutors in ensuring effective early access to legal aid will differ depending on the jurisdiction, the nature and seriousness of the alleged offence and the nature of the investigation.

### Role of prosecutors

When prosecutors are responsible for conducting a criminal investigation, their role and responsibilities are the same as those that apply to police officers. When their function is primarily supervisory at the investigative stage, or when they do not become involved until the point of charge or the first court appearance, their role in relation to the right to early access to legal aid is to ensure that the right has been respected by the police. In doing so, a prosecutor should:

- Consider what action has been taken by the police in respect of the right to early access
- Investigate any assertion by the suspect or accused person, or their legal aid provider, that the right was not respected
- Take appropriate action when the right was not, or may not have been, respected, including ensuring that the person is notified of his or her right to early access to legal aid and facilitating it without delay.

### Responsibilities of prosecutors

In carrying out their role, prosecutors have the following responsibilities.

#### *Checking whether the right to early access was respected*

When a prosecutor is notified of a case during the course of an investigation being conducted by the police or other agency, or receives the case file prior to the first court appearance, the prosecutor should check:

- Whether the suspect or accused person has been properly notified of his or her right to early access to legal aid
- Whether the suspect or accused person has decided to exercise that right
- Whether and what actions have been taken to facilitate access to a legal aid provider.

When, in accordance with the law of a particular country, a suspect or accused person appears before a prosecutor (for example, to be questioned or for the prosecutor to determine whether the person should be further detained), the prosecutor should ensure that the person is notified of the right to early access to legal aid and is given the opportunity to exercise that right.<sup>168</sup> In countries where free legal aid is limited to mandatory defence cases, the prosecutor may also need to evaluate whether the interests of justice require immediate action to appoint a lawyer.

If a prosecutor is notified of a case in respect of a pretrial detention hearing, the prosecutor should ensure that the accused person has been notified of his or her right to early access to legal aid, and determine whether he or she has exercised the right for the purpose of being represented at the hearing. If the accused person has

<sup>168</sup>United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, principle 3, provides that it is the responsibility of prosecutors to ensure that those who appear before them who cannot afford a lawyer and/or who are vulnerable are provided with access to legal aid.

not been notified of the right, the prosecutor should take appropriate action to ensure that he or she is notified and, if necessary, seek an adjournment of the hearing to enable the accused to be represented.

*Considering evidence obtained in breach of the right to early access to legal aid*

When a prosecutor is aware that evidence was obtained following a breach of the right to early access to legal aid, he or she should consider, in the light of the relevant law, what use to make of that evidence. This may mean that he or she does not seek to introduce or rely on the evidence so obtained, and should at least draw it to the attention of the court (see chapter III, section G, for information on remedies and safeguards for such breaches of the right to early access to legal aid).

*Drawing no adverse inference from exercise of the right to early access to legal aid*

Since, under the United Nations Principles and Guidelines, the right to legal aid is a right which should be guaranteed at the highest possible level (principle 1), a prosecutor should draw no adverse inference or conclusion from the fact that a suspect or accused person has exercised his or her right to legal aid.

*Dealing with systemic or routine failures*

When a prosecutor is aware that the police, other investigative agencies or detention authorities routinely breach the right to early access to legal aid, he or she should take appropriate action to bring the breach to the attention of the relevant authorities (for example, the chief officer of police, the judiciary or the relevant Government ministry).

## **D. Role and responsibilities of judges**

The response of the judiciary to breaches of the right to early access to legal aid is critical in ensuring that the right is effective. If the judiciary ignores such breaches, the police or other investigative authorities may have no incentive to give effect to the right, and may even feel encouraged to ignore it. Conversely, if the judiciary gives a strong response to breaches of the right to early access to legal aid, particularly deliberate ones, this will encourage a culture of compliance. Principle 9 of the United Nations Principles and Guidelines provides that States should establish effective remedies and safeguards that apply if access to legal aid is undermined, delayed or denied, or if persons have not been adequately informed of their right to legal aid. Such remedies should be reflected in the law, but even if they are not directly reflected, the judiciary normally has sufficient discretion to enable it to provide effective remedies. What is an effective remedy in any particular case will depend upon the nature of the breach, the consequences or potential consequences of the breach, and the applicable law. One possible approach could be making a decision not to admit, or not to rely on, evidence obtained in consequence of a breach, or to take the breach into account in determining the credibility or strength of the relevant evidence.

### Role of judges

The role of judges in respect of the right to early access to legal aid is to ensure that the right of early access to legal aid has been respected by the police (and prosecutor, if relevant), to take appropriate action in respect of breaches of that right. When an accused person appears at a pretrial detention hearing without representation by a legal aid provider, the judge should ensure that the accused person is notified of and understands the right and, if the person wishes to exercise the right, to facilitate prompt access to a legal aid provider.

### Responsibilities of judges

In carrying out their role, judges have the following responsibilities:

#### *Responsibilities at pretrial detention hearings*

Principle 3 and guidelines 2 and 4 of the United Nations Principles and Guidelines impose a duty on the judiciary to ensure that accused persons who appear before them at pretrial hearings have legal representation. When a person appears without legal representation before a judge at a pretrial detention hearing, the judge should take appropriate steps to inform that person of his or her right to legal aid and to enable him or her to make a voluntary and informed decision. When necessary, the judge should adjourn the hearing to enable the person to exercise his or her right to legal aid.

#### *Checking whether the right to early access was respected*

When evidence is the result of, or the case file contains, an interview conducted by the police or other investigative agency, the judge should ascertain whether the accused person was properly notified of his or her right to early access to legal aid, the decision made as to whether to exercise the right and the actions taken to facilitate access to a legal aid provider. Judges should be aware of, and respond appropriately to, strategies that may have been adopted by the police or investigating agency to avoid the right to legal aid at the investigative stage: for example, dealing with a suspected criminal offence under an administrative or other procedure when the right does not apply, dealing with a de facto suspect as a witness or making an informal arrest.

#### *Drawing no adverse inference from exercise of the right to early access to legal aid*

Since under the United Nations Principles and Guidelines, the right to legal aid is a right which should be guaranteed at the highest possible level (principle 1), a judge should draw no adverse inference or conclusion from the fact that a suspect or accused person has exercised his or her right to legal aid.

#### *Determining an appropriate remedy in the case of a breach of the right to early access to legal aid*

For the reasons given at the beginning of the present section, the judicial response to a breach of the right to early access to legal aid is critical to whether the right is

routinely respected in practice. Domestic laws differ as to the impact of a breach of a procedural right at the investigative stage on the trial and whether evidence obtained following such a breach can or should be excluded from consideration at trial. However, judges should be mindful of the requirement that remedies for such a breach must be effective (principle 9 of the United Nations Principles and Guidelines). A mere declaration of illegality is unlikely to amount to an effective remedy. (See chapter III, section G, for information on remedies and safeguards for such breaches.)

### *Dealing with systemic or routine failures*

When a judge is aware that the police, other investigative agencies or detention authorities, or prosecutors routinely breach the right to early access to legal aid, he or she should take appropriate action to bring those breaches to the attention of the relevant authorities (for example, the chief officer of police, the chief prosecutor or the relevant Government ministry).

## SUMMARY OF KEY ISSUES

1. The police (and other investigative agencies and detention officers), prosecutors and judges all play an important role in ensuring that the right to early access to legal aid is respected in practice, which is recognized by the principles 7, 8 and 9 of the United Nations Principles and Guidelines, together with the associated guidelines.
2. Police authorities (and other investigative and detention agencies) should provide clear instructions to officers on how to give effect to the right to early access to legal aid and devise processes, procedures and recording mechanisms that are designed to give effect to the right. In addition, they should devise appropriate training so that officers know the relevant law regarding, and understand the importance of, early access to legal aid.
3. The role of police officers (and other relevant officials) in respect of early access to legal aid is to ensure that this right is respected in practice. In carrying out this role, officers have a number of responsibilities, including:
  - Identifying whether a suspect or accused person is a child or otherwise vulnerable
  - Informing suspects and accused persons of their right to legal aid as soon as practicable after arrest or detention, preferably in accordance with a standard form of notice, and ensuring that it can be understood
  - Enabling a suspect or accused person to make a voluntary and informed decision about whether to exercise his or her right to early access to legal aid
  - Contacting a legal aid provider
  - When a suspect or accused person has exercised his or her right to legal aid, refraining from interviewing that person, except as allowed for by law
  - Providing information to the legal aid provider
  - Facilitating access by the legal aid provider
  - Imposing no pressure on the legal aid provider
  - Recording (and, in the case of senior officers, monitoring) actions taken and decisions made in respect of early access to legal aid.

4. If prosecutors are responsible for conducting a criminal investigation, their role and responsibilities are the same as those of police officers. If their function is primarily supervisory at the investigative stage, or if they do not become involved until the point of charge or the first court appearance, their role in relation to the right to early access to legal aid is to ensure that the right has been respected by the police. In carrying out their role, prosecutors have the following responsibilities:

- Checking whether the right to early access to legal aid was respected by the police or other investigative agency
- Considering whether to use evidence obtained in breach of that right
- Drawing no adverse inference from the fact that a suspect or accused person has exercised his or her right to early access to legal aid
- Dealing appropriately with systemic or routine failures.

5. The role of judges in respect of the right to early access to legal aid is to ensure that the right has been respected by the police (and prosecutor, if relevant), to take appropriate action in respect of breaches of that right and, when an accused person appears at a pretrial detention hearing without representation by a legal aid provider, to ensure that the accused person is notified of and understands the right and, if the person wishes to exercise the right, to facilitate prompt access to a legal aid provider. In carrying out their role, judges have the following responsibilities:

- At pretrial detention hearings, to ensure that accused persons who appear before them have legal representation and, if they do not, to inform them of their right to legal representation, enable them to make an informed and voluntary decision regarding such representation and facilitate access to a legal aid provider
- To check whether the right to early access to legal aid was respected by the police or other investigative agency and, when relevant, the prosecutor, being particularly aware of strategies that may have been adopted to avoid respecting that right
- To draw no adverse inferences from the fact that an accused person has exercised his or her right to early access to legal aid
- If evidence has been obtained in breach of the right to early access to legal aid, to determine an appropriate, effective remedy
- To deal appropriately with system or routine failures to respect the right to early access to legal aid.





## VII. Developing strategies for early access to legal aid

### A. Introduction

Ensuring that suspects and accused persons have effective early access to legal aid in accordance with the United Nations Principles and Guidelines is a challenging enterprise. While appropriate policies and legislation are essential, experience shows that they will not have the desired impact unless close attention is paid to the legal provisions governing early access, to organizational structures and resources, to the detailed mechanisms by which legal aid is delivered and to the professional cultures, expertise and commitment of legal aid providers and other criminal justice officials.

The United Nations Principles and Guidelines place primary responsibility on States for ensuring that early access to legal aid is guaranteed in practice. However, lawyers and bar associations, criminal justice officials (the police, detention officers, prosecutors and the judiciary), NGOs, civil society organizations and educational institutions all have an important role to play in the organization and delivery of effective early access, in ensuring that the special needs of particular groups are adequately catered for, in sustaining and improving the provision of such access and in improving public knowledge and understanding of the right to such access.

States are in many different stages of development in terms of compliance with the early access provisions of the United Nations Principles and Guidelines. Some countries already have well-developed legal aid schemes covering all stages of the criminal justice process. Other countries do make provision for criminal legal aid, but delivery in practice, especially at the early stages of the criminal justice process, falls short of the requirements of the United Nations Principles and Guidelines. A significant number of countries do not have a functioning criminal legal aid system. For many countries, developing effective legal aid is hindered by financial constraints, ineffective or badly functioning criminal justice institutions and processes, and a lack of lawyers willing and able to provide legal aid services in locations, and for client populations, where they are needed. Where criminal justice systems do not operate effectively, the development of early access to legal aid will also require action to improve the functioning of the system more generally. However, early access schemes may also play an important role in improving the operation of criminal justice institutions and processes (see chapter II, section C, for the benefits of early access).

The purpose of the present chapter is to provide a guide to developing strategies for implementing the early access to legal aid provisions of the United Nations Principles and Guidelines. For a guide to programming for legal aid in criminal justice systems generally, see the *Handbook on Improving Access to Legal Aid in Africa*.<sup>169</sup> The relevance of each section of the present chapter will depend upon the level of existing provision, but each section can be used for the purpose of reviewing the level of compliance with the United Nations Principles and Guidelines, and determining appropriate strategies and actions, in any country. In using the guidance, it will be necessary to refer to the relevant chapters and annexes of the present *Handbook*, where many examples are given of existing laws, models of legal aid provision, processes and procedures which may be of assistance in implementing early access to legal aid in any particular country.

## B. Developing a national strategy for early access to legal aid

A coherent approach to ensuring early access to legal aid requires that a national strategy be developed in that regard, although such a strategy may be one part of a strategy for legal aid covering the whole criminal justice system. This is primarily the responsibility of States, but it will be more effective if the development of a national strategy is carried out in consultation with key stakeholders such as bar associations, the police, prosecutors, the judiciary, NGOs and civil society organizations.<sup>170</sup>

### National strategy checklist

- Identify the key requirements of the early access provisions of the United Nations Principles and Guidelines and the strategic objectives required for meeting those requirements.
- Assess existing laws and regulations relevant to early access to legal aid (preferably using a human rights framework which takes into account such factors as gender, race, age and disability), identify what legal changes are necessary to facilitate early access and develop a plan for introducing and implementing such laws and regulations.
- Identify the need and likely demand for early access to legal aid, including the number of suspects and accused persons who are eligible, the demographic characteristics of the population of suspects/accused persons, their geographical location and the needs of vulnerable groups and those with special needs.<sup>a</sup>
- Conduct a survey of existing provision of legal aid, compare it with the pattern of need and identify and implement appropriate methods of delivery and appropriate models of provision to meet the pattern of identified need, including the needs of vulnerable groups and those with special needs.
- Consider the current arrangements for funding and administering legal aid and, where necessary, identify, plan and implement appropriate structures and mechanisms for sustainable funding and administration of legal aid.

<sup>169</sup>United Nations Office on Drugs and Crime, *Handbook on Improving Access to Legal Aid in Africa*, especially chapter VI.

<sup>170</sup>See, for example, United Nations Development Programme, “National Strategy on Access to Justice in Indonesia”; available from [www.snap-undp.org/lepknowledgebank/Public%20Document%20Library/National%20Strategy%20on%20Access%20to%20Justice%20-%20LEAD%20Fact%20Sheet.pdf](http://www.snap-undp.org/lepknowledgebank/Public%20Document%20Library/National%20Strategy%20on%20Access%20to%20Justice%20-%20LEAD%20Fact%20Sheet.pdf); and the Government of South Sudan, Ministry of Justice, Legal Aid Strategy 2011/2013.

- Establish what the current arrangements for training and assuring the quality of legal aid providers are, and for training other criminal justice officials in relation to early access, and devise and implement appropriate mechanisms for the provision of ongoing and up-to-date training and for ensuring the quality of legal aid providers.
- Develop and implement appropriate mechanisms for monitoring and evaluating early access to legal aid and implementing the lessons learned from such monitoring and evaluation.

<sup>a</sup>For an example of a legal needs assessment conducted in Australia, see Christine Coumarelos and others, *Legal Australia-Wide Survey: Legal Need in Australia*, vol. 7, *Access to Justice and Legal Needs* (Sydney, Law and Justice Foundation of New South Wales, 2012). Available from [www.lawfoundation.net.au/ljf/app/6DDF12F188975AC9CA257A910006089D.html](http://www.lawfoundation.net.au/ljf/app/6DDF12F188975AC9CA257A910006089D.html).

While a national strategy is key to implementing the early access provisions of the United Nations Principles and Guidelines, in some countries developing a strategy at the national level may take some time to achieve. The lack of a national strategy does not mean that no action can be taken to introduce early access schemes; there are many examples in the present *Handbook* of schemes designed to deliver early access in particular locations and/or for particular target groups of potential users that have been implemented in the absence of a national strategy.

### C. The legal framework for early access to legal aid

The essential legal framework necessary to give effect to the right to early access is set out in chapter III. Action should be taken to:

- (a) Review the existing laws relevant to early access to legal aid;
- (b) Identify, using the checklist below, what laws need to be introduced or amended to provide the appropriate legal framework;
- (c) Work out a plan of action for the introduction and implementation of those legal changes.

#### Legal framework checklist

1. Constitutional, legislative and regulatory provisions setting out the right of a person arrested, detained, suspected of or charged with a criminal offence to legal advice, assistance and representation.

Are there clear, appropriate provisions governing:

- To whom the right applies?
- Whether legal advice, assistance or representation is mandatory for suspects or accused persons from specified groups, or in specified circumstances?
- The stage at which the right to consult a lawyer arises?
- The circumstances in which derogation from the right to consult a lawyer is permitted?
- The duty to provide information about the right to early access to legal aid?

**Legal framework checklist (continued)**

- The ability of suspects or accused persons to make an informed and voluntary decision about whether to exercise the right to early access to legal aid?
- The obligation of the police or other relevant officials to facilitate a request for early access to legal aid? The right of access to suspects and accused persons by legal aid providers?
- The scope and extent of the right to consult a lawyer, including the right to have a lawyer present in interviews?
- The independence of legal aid providers, and the confidentiality of consultations with legal aid providers?
- Recording, verification and oversight?
- Remedies and safeguards?

## 2. Legislation and regulations governing the right to State-funded legal aid.

Are there clear, appropriate provisions governing:

- To whom the right applies, clearly specifying the circumstances in which a person is entitled to State-funded legal aid without reference to his or her financial resources?
- The circumstances in which a means and/or merits test can be applied in respect of early access, and which clearly set out the tests and how they are to be applied?
- Who decides on granting free legal aid at the early stages of a criminal investigation?
- What State-funded legal aid covers?
- Remuneration for legal aid providers?

**D. Organization and delivery of early access to legal aid**

The organization and delivery of early access to legal aid, which is dealt with in chapter IV, requires that four separate components be considered:

- (a) The institutional arrangements for administering legal aid;
- (b) The mechanisms for delivering early access to legal aid;
- (c) The models for legal aid provision;
- (d) Quality assurance.

The United Nations Principles and Guidelines are not prescriptive as to how the right to early access to legal aid is to be given effect. The appropriate arrangements in any particular country will depend upon a range of factors, including the level and patterns of need, the demographic composition of the potential client group(s), the available financial resources, the availability of lawyers and existing mechanisms for delivering legal aid (see the national strategy checklist in section VII.B.).

**Checklist for the organization and delivery of early access**

1. Institutional arrangements for administering legal aid
  - Has a legal aid body or authority been established to administer legal aid services?
  - What regulations or arrangements are in place to ensure independence in respect of:

(a) decisions regarding individual cases; and (b) legal aid policy?

- Are the responsibilities of the legal aid body or authority for providing, administering, coordinating and monitoring early access to legal aid clearly set out in legislation or regulations?
- Are the arrangements for allocating funds for the administration and provision of legal aid clearly set out in legislation or regulations, and do they provide for the allocation of sufficient funds?
- What obligations are imposed on the legal aid body or authority for reporting on the provision of early access to legal aid, and what arrangements are in place for monitoring the legal aid body or authority?
- Are the arrangements for delivering early access to legal aid set out in the relevant legislation or regulations, or is this a matter for the legal aid body or authority to determine? Are the arrangements appropriate and adequate given the level and patterns of need?
- What are the arrangements for assuring the quality of early access to legal aid, and are they appropriate and sufficient?
- Is State-funded legal aid available without a means or merits test for all persons arrested or detained from the time that they are arrested or detained, up to and including their first appearance before a judge for the purpose of determining whether they are to be released or detained pending trial?
- Are means and/or merits requirements confined to cases or circumstances in which State-funded legal aid without reference to the interests of justice or the financial circumstances of the suspect or accused person is not available?
- Does the legal aid body or authority have responsibility for raising awareness of the right to early access to legal aid?

## 2. The mechanisms for delivering early access

The primary methods of delivering early access to legal aid are:

- (a) Call-in and duty lawyer schemes;
- (b) Embedded schemes;
- (c) Visiting schemes;
- (d) A combination of two or more such schemes.

Is the scheme (or are the schemes) nationally, in particular locations and in respect of particular client groups appropriate, having regard to:

- The level, predictability and patterns of demand
- The needs of particular client groups
- The numbers of qualified lawyers with sufficient knowledge and experience
- The willingness of lawyers to provide legal advice, assistance and representation by appropriate methods and to an acceptable standard
- Whether the law permits legal advice and assistance to be provided by paralegals or law students, and whether appropriate training and quality assurance mechanisms are in place to ensure that they have sufficient expertise and experience to provide it?

### 3. Models of legal aid provision

The major models of legal aid provision in respect of early access to legal aid are:

- (a) Public defender schemes;
- (b) Private lawyer schemes (contract schemes; ex officio or panel schemes; and pro bono schemes);
- (c) Paralegal schemes;
- (d) Legal aid centre and specialist schemes;
- (e) University law clinics.

Is the model (or are the models) of legal aid provision (either currently in existence or planned) appropriate, having regard to:

The financial resources available?

The level, predictability and patterns of demand?

The needs of particular client groups?

The numbers of qualified lawyers with sufficient knowledge and experience?

The willingness of lawyers to provide legal advice, assistance and representation by appropriate methods and to an acceptable standard?

Whether the law permits legal advice and assistance to be provided by paralegals or law students and, if so, whether appropriate training and quality assurance mechanisms are in place to ensure that they have sufficient expertise and experience to provide it?

### 4. Quality assurance

The approach to quality assurance will depend upon whether there is a legal aid body or authority, the model or models of legal aid provision adopted and the relationship between the legal aid body or authority and legal aid service providers. Relevant factors to consider include the following.

#### *Legal aid service providers*

Are appropriate arrangements in place to ensure satisfactory service delivery standards regarding:

- Compliance with ethical standards, including ensuring the independence of legal aid providers in respect of the provision of legal advice, assistance and representation?
- The obligation to accept cases?
- Adequate response times?
- Appropriate methods of delivering legal advice and assistance?
- The maintenance and storing of case records?
- Continuity of representation?
- Prohibition on charging fees for legal aid cases, except where this is permitted by relevant legislation or regulations?

Are appropriate arrangements in place to ensure satisfactory organizational standards regarding:

- The employment of appropriately qualified and experienced staff?
- The provision of personal supervision of, and support for, staff?
- The provision of appropriate training for staff?

- The storage, in a retrievable form, of case files?
- Realistic maximum caseloads?
- The appropriate quality of casework?

#### *Legal aid providers*

Are appropriate arrangements in place to ensure that legal aid providers:

- Comply with an appropriate code of conduct?
- Are competent to provide legal advice, assistance and/or representation in respect of cases that they are allocated?
- Have sufficient training to ensure that they have sufficient up-to-date knowledge and skills appropriate for the cases that they are allocated?
- Participate in any quality assurance scheme operated by the legal aid body or authority, or the relevant legal aid service provider?

## **E. Role and responsibilities of legal aid providers**

The role and responsibilities of legal aid providers is dealt with in chapter V, which should, in particular, be referred to for a detailed account of the role and responsibilities of those who provide legal aid at the early stages of the criminal justice process. The purpose of the checklist below is to prompt consideration of whether these roles and responsibilities are clearly articulated. The role of legal aid providers may be set out in legislation or regulations and/or in a professional code of conduct issued by a bar association or other professional body, a public defender service or other legal aid service provider, or in contracts for legal aid provision. The detailed responsibilities of legal aid providers may be set out in guidance issued by any such organization.

#### **Checklist on the role and responsibilities of legal aid providers**

- Is the role of legal aid providers set out in legislation, a professional code of conduct and/or contracts for legal aid provision?
- Does the legislation, professional code or contract require legal aid providers to act in the best interests of their clients, and does it articulate that role in any further detail?
- What mechanisms are in place to ensure that legal aid providers understand their role, particularly as it relates to early access to legal aid?
- Is there an effective mechanism for ensuring compliance with the role as articulated?
- How are police officers, detention officials, prosecutors and judges informed of the role of legal aid providers?
- Is there guidance on the responsibilities of legal aid providers when providing legal aid at the early stages of the criminal justice process?
- Does the guidance include obligations on legal aid providers to:
  - Respond to requests for legal advice and assistance in a timely and appropriate manner?



**Checklist on the role and responsibilities of legal aid providers (continued)**

- Gather relevant information from the police, the client and other sources?
- Determine any vulnerabilities and special needs of clients?
- Check the legality of actions taken by the police and other authorities in respect of a client?
- Advise the client before, during and after interviews?
- Make appropriate representations?
- Liaise with the client's family and other relevant people?
- Ensure representation at any court hearing in which a decision about pretrial detention is to be made?
- Record all relevant information?

**F. Roles and responsibilities of the police, prosecutors and judges**

The roles and responsibilities of the police, prosecutors and judges in respect of the right to early access to legal aid are dealt with in chapter VI. The purpose of the checklist in the present section is to prompt consideration of whether their roles and responsibilities are sufficiently articulated and understood, and whether the law or regulations should be amended to reflect the significance of the right to early access to legal aid.

**Checklist on the roles and responsibilities of police, prosecutors and judges***Police officers (and other detention officials)*

- Is the role of the police in respect of early access to legal aid clearly and appropriately set out in legislation or regulations?
- Does the legislation or regulation impose a clear obligation on police officers (and other detention officers) to:
  - Inform suspects and accused persons of their right to early access at the time, and in the form, required by law or regulations?
  - Enable suspects and accused persons to make a voluntary and informed decision about whether to exercise their right to early access?
  - If a suspect or accused person decides to exercise his or her right to early access, contact a legal aid provider in accordance with the established procedure
  - If a suspect or accused person decides to exercise his or her right to early access, refrain from interviewing the person or carrying out a procedural action, except as provided for by law
  - Provide appropriate information to the legal aid provider?
  - Facilitate access to the suspect or accused person by the legal aid provider?
  - Refrain from imposing any improper pressure on the legal aid provider?
  - Record and monitor relevant decisions and actions?

*Prosecutors*

- Is the role of prosecutors in respect of early access to legal aid clearly and appropriately set out in legislation or regulations?
- Does the legislation or regulation impose a clear obligation on prosecutors to:
  - Check whether the right to early access to legal aid was respected and, where appropriate, to ensure that a suspect or accused person is informed of his or her right to early access and is given the opportunity to exercise that right?
  - Consider whether to make use of evidence obtained in breach of the right to early access to legal aid?
  - Refrain from drawing any adverse conclusion from the fact that a suspect or accused person has exercised his or her right to early access to legal aid?
  - Take appropriate action in respect of any systemic or routine failure by the police or other investigative agency to respect the right to early access to legal aid?

*Judges*

- Is the role of judges in respect of early access to legal aid clearly set out in legislation or regulations?
- Does the legislation or regulation impose a clear obligation on judges to:
  - (At any pretrial detention hearing,) ensure that an accused person who appears before him or her is aware of the right to legal aid, and to facilitate access to a legal aid provider when an accused person chooses to exercise that right?
  - Check whether the right to early access to legal aid was respected by the police, other investigative authority or prosecutor?
  - Refrain from drawing any adverse conclusion from the fact that a suspect or accused person has exercised his or her right to early access to legal aid?
  - (In circumstances in which evidence has been obtained following breach of the right to early access to legal aid,) determine an appropriate remedy?
  - Take appropriate action in respect of any systemic or routine failure by the police or other investigative agency to respect the right to early access to legal aid?



# Annex I. Training curriculum for legal aid providers

## 1. Purpose of the training curriculum

The purpose of the present training curriculum is to provide a resource for training legal aid providers so that they may give effect to the right to early access to legal aid as provided for by the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. Effective implementation of the right to early access requires legal aid providers to be clear about their role, to be familiar with the relevant law and procedures and to have the skills necessary to apply that knowledge in practice.

The curriculum proposed below is not intended to be prescriptive. Training needs in any particular setting will depend upon the legal context relevant to early access to legal aid, the nature of the scheme for delivering early access (call-in scheme, embedded scheme or visiting scheme) and the model of legal aid provision adopted. They will also depend upon the existing levels of knowledge, skills and experience of the legal aid providers. Therefore, the training curriculum will need to be adapted to suit particular training requirements. The length of the training may also vary depending on the level of knowledge of the participants and whether the training is conducted in the context of a new/pilot scheme or is ongoing.

## 2. Learning objectives

The overall objective of the training curriculum is to enable legal aid providers to fulfil their proper role in delivering early access to legal aid.

The role of the legal aid provider is to protect and advance the rights and legitimate interests of his or her clients. In doing so, the legal aid provider must:

- Loyal respect and take any necessary actions to further the interests of his or her clients, having particular regard to their age, gender, ethnicity or sexual orientation
- Seek to ensure that his or her clients are treated with dignity, that their human rights are respected and that they are treated in accordance with the law

- Provide advice and assistance to and, as appropriate, representation for, his or her clients, taking into account any relevant vulnerability
- Seek to ensure that decisions of his or her clients are respected
- Seek to ensure that clients continue to receive advice, assistance and representation until their case is finally disposed of, including in any appeal.

The specific learning objectives are:

*Knowledge:* A working knowledge and understanding of the law, procedure and contextual factors that are relevant to advising suspects and accused persons who have been arrested or detained on suspicion of having committed a criminal offence, including those who are vulnerable.

*Skills:* An understanding of the skills necessary to provide effective legal advice, assistance and representation to suspects and accused persons, including those who are vulnerable or who have special needs, who have been arrested or detained on suspicion of having committed a criminal offence. The relevant skills include:

- Assertion skills: Standing up for the rights and interests of the client
- Information-gathering skills: Obtaining relevant information from the client, the police and third parties
- Legal advice and representation skills: Providing good advice in a way that is appropriate to a client and, where necessary, representing the client before a court
- Negotiation skills: Seeking to persuade a police officer, prosecutor or other official to adopt a course of action or make a decision that is in the interests of the client.

*Applying knowledge and skills:* An ability to apply the knowledge and skills in practice in order to advance the rights and legitimate interests of the client.

The training programme should include components and exercises that are designed to address each of the learning objectives. These may include oral and audiovisual presentations, written information, problem-solving exercises, group discussion and role play. Role play is particularly valuable for developing the ability to apply knowledge and skills. Joint training with police officers and/or other relevant officials is an effective method for developing knowledge and understanding of the context in which legal aid is delivered, and for developing the ability to apply knowledge and skills. It can also build trust among legal aid providers and police and facilitate access by legal aid providers to police stations. However, joint training should not be considered for training in basic skills. Joint training should be planned and implemented so that it does not lead to any inappropriate links between police officers and legal aid providers. (See the discussion of “pocket” lawyers in chapter IV, section C.)

### 3. The training curriculum

<i>Module</i>	<i>Elements</i>
1. Role and professional obligations of the legal aid provider	<p>(a) Role of the legal aid provider in delivering early access to legal aid</p> <p>(b) Obligations of the legal aid provider to suspects and accused persons</p> <p>(c) Obligations of the legal aid provider to the police, prosecutors, judges and third parties</p> <p>(d) Being an ethical practitioner: the ethical rules applicable to legal aid providers</p> <p>(e) Maintaining good case records</p> <p>(f) Keeping up to date with law and procedure</p> <p>(g) Importance of reflective practice: learning from experience to improve future practice</p>
2. Legal and procedural framework	<p>(a) Right to legal advice and assistance at the early stages of the criminal justice process, including the rights of the suspect or accused person and the rights of the legal aid provider</p> <p>(b) Right to State-funded legal aid at the early stages of the criminal justice process</p> <p>(c) Powers of the police (and other investigative agencies), prosecutors and judges regarding arrest, detention, treatment of suspects in custody, interviewing, evidence gathering and length of detention</p> <p>(d) Rights of suspects and accused persons (for example, the right to silence, the right to have someone informed of the arrest or detention, the right to an interpreter)</p> <p>(e) Special rules applicable to children and other vulnerable suspects and accused persons</p> <p>(f) Salient examples of common offences and defences and how to find law governing other offences and defences</p> <p>(g) Significant evidential and procedural rules</p> <p>(h) Pretrial detention</p>
3. Understanding police objectives and conduct (and those of other investigative agencies and prosecutors, if relevant)	<p>(a) The official account of police objectives (if relevant)</p> <p>(b) Police objectives and strategies in interviewing suspects and accused persons</p> <p>(c) Police attitudes towards legal aid and legal aid providers</p> <p>(d) Rights-avoidance strategies</p> <p>(e) Appropriate responses to unlawful conduct</p>
4. Responding to a request for legal aid	<p>(a) Identification of objectives: speedy response in an appropriate form</p>

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4. Responding to a request for legal aid (*continued*)
- (b) Contact with third parties (for example, if the initial contact is made by a third party or if a third party may have useful information)
  - (c) Initial contact with the police (or other relevant authority)
  - (d) Relevant factors in determining the mode of response
  - (e) Notification of the client if attendance is to be delayed
- 
5. Determining vulnerabilities and catering for special needs
- (a) Identifying relevant vulnerabilities of suspects and accused persons (for example, language difficulties, mental disorder or vulnerability and vulnerabilities arising from age, ethnicity, nationality, gender or gender identity)
  - (b) Taking appropriate actions to deal with identified vulnerabilities
- 
6. Gathering information from the police (or other relevant authority)
- (a) Obtaining information about the time, grounds and reasons for arrest or detention, and checking legality
  - (b) Obtaining information about the circumstances of the arrest or detention
  - (c) Obtaining information concerning what is known by the police about the client
  - (d) Obtaining information about the evidence already in the possession of the police
  - (e) Obtaining information about the likely course of the investigation and investigative procedures planned or likely to be undertaken
- 
7. Consulting with the client
- (a) Obtaining information about the client's personal circumstances and any particular concerns he or she may have
  - (b) Obtaining information about the circumstances of the arrest or detention, including anything already disclosed to the police (or other authority)
  - (c) Obtaining information about the alleged offence or offences (the client's version of events)
  - (d) Obtaining information relevant to pretrial detention
  - (e) Formulating and providing appropriate advice regarding the client's legal position, what strategy to adopt when the client is interviewed, and in respect of any other relevant investigative procedure
  - (f) Preparing the client for interview
- 
8. Advising and assisting during interview of the client by the police (or other relevant authority)
- (a) Objectives of the legal aid provider in the police interview
  - (b) Determining whether and when to intervene
  - (c) Effective methods of intervention
  - (d) Appropriate responses to police attempts to undermine the legal aid provider and/or procedural rights (for example, the right to silence)
  - (e) Appropriate responses to unfair or unlawful conduct
-



9. Advising and assisting after the interview	<p>(a) Evaluating the interview</p> <p>(b) Advising on the likely course of the investigation, and detention</p> <p>(c) Considering what action to take regarding the investigation (for example, securing evidence, lines of enquiry to be pursued, contacting witnesses) and pretrial detention (if relevant)</p> <p>(d) Ensuring continuing advice, assistance and representation</p>
10. Representation at a pretrial detention hearing	<p>(a) Obtaining information relevant to the hearing</p> <p>(b) Identifying and contacting relevant third parties (for example, potential sureties) and securing their attendance at the hearing</p> <p>(c) Considering alternatives to pretrial detention (for example, conditional release) and obtaining any necessary information (for example, the terms for accepting a person to a pretrial release scheme)</p> <p>(d) Making appropriate representations to the court</p> <p>(e) Considering appropriate courses of action if pretrial detention is ordered</p>

Note that the curriculum applies to legal aid providers in general, and that training for non-lawyers will generally not include a module on representation.

#### 4. Special training for legal aid providers who provide legal aid for children

The training curriculum set out above includes a module on “Determining vulnerabilities and catering for special needs”, which includes if the client is a child. However, if legal aid providers regularly provide legal aid at the early stages of the criminal justice process to children, a dedicated training course should be devised for them. Such a training course should include:

- An overview of the international standards relating to juvenile justice, including the obligation in criminal proceedings to have regard for a child’s best interests.
- Domestic law relevant to children in the early stages of the criminal justice process, including laws and regulations governing:

The age of criminal responsibility

The substantive criminal law as it relates to children

The right to legal aid

The conditions and length of detention

Any obligation to appoint an independent adult to protect the interests of the child

Any special provisions regarding diversion from the criminal justice process

Any special provisions regarding pretrial detention.

- The psychology of child development with reference to the criminal justice process.

The special skills required for providing legal aid to children:

Communication with children in conflict with the law

Assessing the reliability of information provided by children

Ensuring a child's effective participation in the criminal justice process

Planning defence strategies.

- The special knowledge and skills required for representing a child at a pretrial detention hearing.

## Annex II. Training curriculum for police officers

### 1. Purpose of the training curriculum

The purpose of the training curriculum for police officers is to provide a resource for training police officers and other investigators of crime so that they may give effect to the right to early access to legal aid as provided for by the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

The police often rely on securing evidence, and confessions, through interrogation as a major element of their investigation strategy, and in some cases it may be the only investigation strategy. The right to early access to legal aid, and the provision of legal advice and assistance before, and during, police interviews may be perceived by police officers as a significant limitation on their ability to investigate crime or to secure convictions. If the right to legal aid is to be effective in practice, police officers need the skills required to interview suspects and accused persons professionally, but they also need resources and skills to effectively investigate crime by other means.

The present training curriculum is not designed as a curriculum for police investigation generally. However, it may be adapted so that it can be incorporated into a police investigation training programme.

The curriculum is not intended to be prescriptive. Training needs in any particular setting will depend upon the legal context relevant to early access to legal aid, the nature of the scheme for delivering early access (call-in scheme, embedded scheme or visiting scheme) and the model of legal aid provision adopted. They will also depend upon the existing levels of knowledge, skills and experience of the police officers concerned, and their specific roles. Therefore, the training curriculum will need to be adapted to suit particular training requirements.

### 2. Learning objectives

The overall objective of the training curriculum is to enable police officers and other investigators of crime to fulfil their proper role in facilitating early access to legal aid.

The specific learning objectives are:

1. A working knowledge of the law governing early access to legal aid for persons who have been arrested or detained on suspicion of having committed a criminal offence, including those who are vulnerable.
2. An understanding of the responsibilities of police officers in ensuring that the right to early access to legal aid is respected.
3. The ability to identify the particular needs of vulnerable suspects and accused persons in respect of the right to early access to legal aid, and to be able to address those needs appropriately.
4. A working knowledge of the relevant mechanisms for delivering early access to legal aid, and the procedures for contacting the relevant legal aid provider.
5. An understanding and appreciation of the role of legal aid providers in delivering early access to legal aid.
6. An understanding of the importance of recording actions taken and decisions made in respect of the right to early access to legal aid in a verifiable form.

The training programme should include components and exercises that are designed to address each of the learning objectives. These may include oral and audiovisual presentations, written information, problem-solving exercises, group discussion and role play. Role play is particularly valuable for developing the ability to apply knowledge and skills. Joint training with prosecutors and/or legal aid providers is an effective method for developing knowledge and understanding of the right to legal aid, and for developing the ability to apply knowledge and skills (see the comments on joint training in annex I above).

### 3. The training curriculum

<i>Module</i>	<i>Elements</i>
1. Legal and procedural framework	<p>(a) Right to legal advice and assistance at the early stages of the criminal justice process, including the rights of suspects and accused persons and the rights of legal aid providers</p> <p>(b) Right to State-funded legal aid at the early stages of the criminal justice process</p> <p>(c) Police powers regarding arrest, detention, treatment of suspects in custody, interviewing, evidence gathering and length of detention</p> <p>(d) Rights of suspects and accused persons (for example, the right to silence, the right to have someone informed of the arrest or detention and the right to an interpreter)</p> <p>(e) Special rules applicable to children and other vulnerable suspects and accused persons</p>
2. Rationale for the right to early access to legal aid, and understanding the role of the legal aid provider	<p>(a) Rationale for the right to early access to legal aid, and its significance in ensuring a fair trial</p>

	<p>(b) Role of the legal aid provider in providing legal aid at the early stages of the criminal justice process</p> <p>(c) Role of the legal aid provider in providing legal advice and assistance to suspects and accused persons in police interviews</p>
3. Determining vulnerabilities and catering for special needs	<p>(a) Identifying relevant vulnerabilities of suspects and accused persons (for example, language difficulties, mental disorder or vulnerability and vulnerabilities arising from age, ethnicity, nationality, gender or gender identity)</p> <p>(b) Taking appropriate actions to deal with identified vulnerabilities</p>
4. Informing suspects and accused persons of the right to early access to legal aid	<p>(a) Who is to be provided with information about the right to early access to legal aid</p> <p>(b) When notification is to be provided</p> <p>(c) Responsibilities for providing information: who is required to provide the information</p> <p>(d) How the notification is to be provided, and how it is to be explained</p>
5. Enabling suspects and accused persons to make a voluntary and informed decision about whether to exercise the right to early access to legal aid	<p>(a) How to determine whether the suspect or accused person understands his or her right to early access to legal aid</p> <p>(b) How to respond if the suspect or accused person asks for advice about whether to exercise that right</p> <p>(c) Importance of not influencing a suspect or accused person against exercising the right, and not influencing him or her to nominate a particular legal aid provider</p>
6. Giving effect to the decision of the suspect or accused person	<p>(a) Procedure for contacting a legal aid provider</p> <p>(b) Obligation to contact a legal aid provider without delay</p> <p>(c) Informing the suspect or accused person of action taken to give effect to his or her decision</p> <p>(d) Impact of a decision to exercise the right to early access on proceeding with investigative measures</p> <p>(e) Procedure to be followed if the legal aid provider is unable or unwilling to provide advice and assistance or if there is a delay in the provider attending the police station</p>
7. Facilitating legal advice and assistance	<p>(a) Providing information as to the grounds and reasons for arrest or detention</p> <p>(b) Providing information as to the investigation of the alleged offence</p> <p>(c) Facilitating confidential consultations between the suspect or accused person and the legal aid provider</p> <p>(d) Facilitating the presence of the legal aid provider in police interviews</p> <p>(e) Appropriate responses to intervention by the legal aid provider during police interviews</p> <p>(f) Appropriate responses to representations made by or conflicts with a legal aid provider</p>
8. Recording actions taken and decisions made	<p>(a) Rationale for the recording requirements</p> <p>(b) What is to be recorded and the mode of recording</p>



## Annex III. Useful materials

United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, General Assembly resolution 67/187, annex.

Available from [www.un.org/Docs/journal/asp/ws.asp?m=A/RES/67/187](http://www.un.org/Docs/journal/asp/ws.asp?m=A/RES/67/187).

### Children

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New Zealand: Bill of Rights Act 1990, s. 23, available at [www.legislation.govt.nz/act/public/1990/0109/latest/DLM225525.html](http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM225525.html); Legal Services Act 2011, available at [www.legislation.govt.nz/act/public/2011/0004/latest/whole.html#DLM3142816](http://www.legislation.govt.nz/act/public/2011/0004/latest/whole.html#DLM3142816).

Sierra Leone: Legal Aid Act 2012, available at [www.sierralii.org/sl/legislation/act/2012/6](http://www.sierralii.org/sl/legislation/act/2012/6).

## Legal aid provision

American Bar Association, *Directory of Law School Public Interest and Pro Bono Programs*, available at <http://apps.americanbar.org/legalservices/probono/lawschools/>.

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## Annex IV. Model letter of rights

Set out below is the indicative model letter of rights that is contained in annex I of directive 2012/13/EU of the European Parliament and of the Council of the European Union of 22 May 2012 on the right to information in criminal proceedings (available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:EN:PDF>). Under the directive, a letter of rights must be provided promptly to a person who has been arrested or detained, who must be given the opportunity to read it and be allowed to keep it throughout the time that they are deprived of their liberty (art. 4). The obligation to provide a letter of rights is in addition to an obligation to provide information, orally or in writing, to suspects or accused persons whether or not they have been arrested or detained (art. 3).

You have the following rights when you are arrested or detained:

### A. ASSISTANCE OF A LAWYER/ENTITLEMENT TO LEGAL AID

You have the right to speak confidentially to a lawyer. A lawyer is independent from the police. Ask the police if you need help to get in contact with a lawyer, the police shall help you. In certain cases the assistance may be free of charge. Ask the police for more information.

### B. INFORMATION ABOUT THE ACCUSATION

You have the right to know why you have been arrested or detained and what you are suspected or accused of having done.

### C. INTERPRETATION AND TRANSLATION

If you do not speak or understand the language spoken by the police or other competent authorities, you have the right to be assisted by an interpreter, free of charge. The interpreter may help you to talk to your lawyer and must keep the content of that communication confidential. You have the right to translation of at least the relevant passages of essential documents, including any order by a judge allowing your arrest or keeping you in custody, any charge or indictment and any judgment. You may in some circumstances be provided with an oral translation or summary.

#### D. RIGHT TO REMAIN SILENT

While questioned by the police or other competent authorities, you do not have to answer questions about the alleged offence. Your lawyer can help you to decide on that.

#### E. ACCESS TO DOCUMENTS

When you are arrested and detained, you (or your lawyer) have the right to access essential documents you need to challenge the arrest or detention. If your case goes to court, you (or your lawyer) have the right to access the material evidence for or against you.

#### F. INFORMING SOMEONE ELSE ABOUT YOUR ARREST OR DETENTION/ INFORMING YOUR CONSULATE OR EMBASSY

When you are arrested or detained, you should tell the police if you want someone to be informed of your detention, for example a family member or your employer. In certain cases the right to inform another person of your detention may be temporarily restricted. In such cases the police will inform you of this.

If you are a foreigner, tell the police if you want your consular authority or embassy to be informed of your detention. Please also tell the police if you want to contact an official of your consular authority or embassy.

#### G. URGENT MEDICAL ASSISTANCE

When you are arrested or detained, you have the right to urgent medical assistance. Please let the police know if you are in need of such assistance.

#### H. PERIOD OF DEPRIVATION OF LIBERTY

After your arrest you may be deprived of liberty or detained for a maximum period of ... [*fill in applicable number of hours/days*]. At the end of that period you must either be released or be heard by a judge who will decide on your further detention. Ask your lawyer or the judge for information about the possibility to challenge your arrest, to review the detention or to ask for provisional release.

## Annex V.

### Sample checklists for legal aid providers<sup>a</sup>

#### Checklist 1

##### Summary of information to be obtained from the police before they interview the client

1. A history of the case, or “case narrative”, including whether and how the case was reported to the police or whether and why the police initiated the investigation, how the client came to be arrested, what happened at the time of arrest and what has happened in the case so far.
2. What investigations have been made at the crime scene (if relevant), including who has attended (for example, arresting and other officers, scene-of-crime officers, forensic specialists).
3. What relevant communications have taken place (for example, between members of the public and the police, and between police officers), what was said and how this has been recorded, and whether the client has said anything to the police that is relevant to the alleged offence. If appropriate, the legal aid provider should ask to see or hear the records that have been made.
4. Who has been interviewed in relation to the case, and who has made a statement. The lawyer should ask to see any relevant statements. Where appropriate, a detailed note should be taken of descriptions given of relevant events and relevant people, especially possible suspects.
5. What searches have been conducted, samples taken, and photographs or other recordings made. The lawyer should ask to see the product of such activities and ask whether any other searches or similar activities are planned.
6. What relevant real evidence or objects the police have in their possession (for example, weapons, documents, clothing, CCTV recordings). If appropriate, the lawyer should ask to see such items.
7. What forensic examinations or tests have been conducted, and the results of such examinations or tests. What forensic examinations or tests are planned.
8. What other investigations, interviews of witnesses, forensic tests or investigative actions are planned.
9. What information the officer has concerning the client, including any vulnerabilities, previous convictions or other forms of previous misconduct.
10. Whether the police intend to interview the client and, if so, what matters they intend to cover in the interview.

<sup>a</sup>The checklist is adapted from a checklist developed for lawyers in England and Wales (see Ed Cape, *Defending Suspects at Police Stations: Practitioner’s Guide to Advice and Representation*, 6th ed. (London, Legal Action Group, 2011)).

11. Whether the police have formed a view about whether the case may be suitable for diversion from prosecution.
12. Whether the police have any relevant information that they have not disclosed to the legal aid provider and, if so, why they have not disclosed it.

## Checklist 2

### Structure of the initial consultation with the client

1. Explain who you are, your status, the fact that legal advice and assistance is free (if appropriate) and how the consultation will be conducted.
2. Seek out any immediate preoccupations or specific needs—for example, medication, food, concern about children, vulnerabilities—and take appropriate action.
3. Take details of the client's background. This may help the client to settle down and develop confidence in you and enables you to assess the client. However, it may be more appropriate to do this later in the interview, particularly if the client is known to you.
4. Tell the client what information you have obtained from the police, give an outline of what the prosecution would have to prove (if appropriate) and (where appropriate) give an initial indication of the apparent strength of the police case.
5. Take the client's account of the relevant circumstances, including the circumstances of the arrest and whether the client has already said anything relevant to the police.
6. Give advice on the client's legal position.
7. Give advice on whether the client should answer questions in the police interview.
8. Give advice (as appropriate) on search, samples, identification procedures or other investigative actions.
9. Brief the client on how the police interview will be conducted and on your role during the interview.
10. Prepare the client for the police interview.







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