

**09 May 2024**

NDA Submission to the Department of Justice on draft Regulations concerning legal aid costs in discharge applications under Part 6 of the Assisted Decision Making (Capacity) Act 2015 (as amended)

# Introduction

The National Disability Authority (NDA) is the independent statutory body with a duty to provide information and advice to the Government on policy and practice relevant to the lives of persons with disabilities, and to promote Universal Design. The NDA welcomes the opportunity to input on the development by the Department of Justice of draft Regulations concerning legal aid costs in discharge applications under Part 6 of the Assisted Decision Making (Capacity) Act 2015 (as amended).

# Wardship research

The NDA is currently undertaking research to evaluate the impact of the cessation of the wardship system in Ireland on people who were made Wards of Court, their Committees and the process of transitioning to the new system of supported decision-making arrangements under the Assisted Decision Making (Capacity) Act 2015 (as amended).

While the research is still ongoing, the NDA is aware from our engagement with key stakeholders that progress in discharging adults from wardship has been slower than anticipated. While the reasons for this appear to vary, one of the issues we have identified as a possible barrier to engagement with the discharge process is a lack of information about eligibility for legal aid and uncertainty regarding legal aid costs. In particular, there is some confusion as to whether and to what extent adults under wardship are liable for civil legal aid costs relating to their discharge application from wardship. We are also aware that conflicting advice is being provided on this point from sources including legal professionals and advocacy organisations.

# Legal aid costs for adults under wardship in discharge applications

The NDA is aware that all adults under wardship are eligible for legal aid for discharge applications under Part 6 of the 2015 Act, irrespective of their financial situation. However, costs may be recoverable at the conclusion of proceedings where the Ward of Court does not satisfy the financial eligibility criteria.

While the Legal Aid Board has established maximum legal aid costs for both contested and uncontested discharge applications under Part 6 of the 2015 Act, it is the NDA’s understanding from our engagement with the Legal Aid Board that clarity on the extent of the liability for legal aid costs cannot be provided in the absence of Regulations from Department of Justice outlining whether and how the agency should operate clawback of costs.

The NDA notes that Section 33(7A) of the Civil Legal Aid Act 1995 as amended by the Assisted Decision-Making (Capacity) (Amendment) Act 2022 provides that where a Ward of Court is granted legal aid for a discharge application under Part 6, but does not satisfy the financial eligibility criteria, the Legal Aid Board ‘may seek to recover some or all of the costs of providing the legal aid to the relevant person concerned.’ The legislation also provides that the Minister for Justice may enact regulations to ‘make provision for the mechanism for recovery of the costs referred to in section 33(7A)’.

The NDA further notes that the Civil Legal Aid Act 1995 (as amended) affords the Legal Aid Board a discretion to waive its right to recover its costs – either fully or in part – where it is of the opinion that not to do so would ‘create hardship’ for the person. The NDA understands that the Legal Aid Board has internally agreed a set of fixed criteria and guidelines for general waiver applications to ensure consistency of approach, but these are not publicly available and do not consider ‘hardship’ in the specific context of adults discharging from wardship.

# Recommendations

## Recommendation 1: Enact Regulations on legal aid costs relating to discharge applications under Part 6 of the 2015 Act as a matter of priority

The NDA notes that almost one year has elapsed since the commencement of the Assisted Decision-Making (Capacity) Act 2015 (as amended) on 26 April 2023. The legislation requires that all adults be discharged from wardship within a three-year transitional period i.e. by 26 April 2026. The NDA is aware from its engagement with key stakeholders that progress in terms of wardship discharge applications has been slower than anticipated, underscoring the need for significantly increased engagement with the discharge process over the next two years. This also underscores the importance of promptly addressing any possible barriers to engagement with the discharge process under Part 6 of the 2015 Act, including lack of clarity regarding liability for legal aid costs.

The NDA therefore advises that the Department of Justice enacts Regulations on the rules governing legal aid costs for discharge applications under Part 6 of the 2015 Act as a matter of priority.

## Recommendation 2: Exempt all adults under wardship from legal aid costs relating to discharge applications under Part 6 of the 2015 Act

The NDA is aware that some confusion exists as to whether and to what extent adults under wardship are liable for civil legal aid costs relating to their discharge application under Part 6 of the 2015 Act. The Regulations should therefore provide clarity on this point as a way of promoting engagement with the discharge process.

The NDA also notes that where the General Solicitor for Minors and Wards of Court acts as Committee, adults under wardship navigating the discharge process are not charged legal fees. This may lead to inequalities in legal costs based on who is acting as Committee. In addition, the NDA understands that a waiver system currently exists, and adults under wardship can apply for a waiver of legal aid costs once the discharge application under Part 6 of the 2015 Act has been completed. However, the NDA advises that uncertainty may persist, as adults under wardship who have been granted legal aid will not know whether their waiver application is approved until after the discharge process has been completed.

To provide utmost clarity, the NDA recommends that the Regulations exempt all adults under wardship from legal aid costs relating to discharge applications under Part 6 of the 2015 Act. In the Appendix, we outline the potential cost of this.

## Recommendation 3: Elaborate additional grounds for waiver of legal aid costs relating to discharge applications under Part 6 of the 2015 Act

The NDA is aware that the Civil Legal Aid Act 1995 (as amended) affords the Legal Aid Board a discretion to waive its right to recover its costs – either fully or in part – where it is of the opinion that not to do so would ‘create hardship’ for the person.

If the Department of Justice chooses not to exempt all adults discharging from wardship from legal aid costs relating to discharge applications under Part 6 of the 2015 Act, the NDA advises that the mechanism for clawback of costs provided for in the Regulations recognise and elaborate a wide variety of potential grounds for waiver of legal aid costs based on ‘hardship’ relevant to the unique and specific circumstances of adults under wardship. For example, the mechanism for clawback of costs could account for and authorise waivers for adults discharging from wardship who may have significant funds, but require these funds to cater for their current and future care, education, medical or accommodation needs due to a personal injury or medical negligence award or settlement. A reduction in these funds through the clawback arrangement could lead to future hardship.

## Recommendation 4: Consult with disabled people and their representative organisations in the development of the draft Regulations

The NDA strongly encourages the Department of Justice to effectively and meaningfully engage with Disabled Persons’ Organisations, disabled people, and people under wardship and their Committees in the development of the draft Regulations.

# Conclusion

The NDA welcomes the opportunity to input on the development of draft Regulations concerning legal aid costs in discharge applications under Part 6 of the Assisted Decision Making (Capacity) Act 2015 (as amended). We would be happy to engage with the Department of Justice on any of the points raised in this submission.

# Appendix – Estimated costs of exempting all adults discharging from wardship from legal aid costs

There are approximately 2100 people under wardship. The General Solicitor for Minors and Wards of Court acts as Committee for approximately one third of these individuals (approximately 700 people). Where the General Solicitor acts as Committee, persons discharging from wardship are not being charged legal fees.

For the remaining (approximately)1,400 people under wardship, the Legal Aid Board has capped the legal aid costs for discharge applications at €3,950 (excluding VAT) for uncontested cases (which will likely constitute most cases) and €5,835 (excluding VAT) for contested cases. Any person discharging from wardship who satisfies the means test does not have to pay legal aid costs.[[1]](#footnote-1) To estimate costs, three possible scenarios are outlined in Table 1 below.

* Scenario A would cost just over €6 million, excluding VAT. However, the NDA considers this scenario highly unlikely as it is based on a high proportion of contested discharges and assumes that no applicants meet the means test.
* Scenario B assumes that 25% of applicants meet the means test, and that contested applications account for 10% of all applications (or approximately 13% of those that do not meet the means test). Scenario B is a more likely and possible scenario and would cost €4.4 million, excluding VAT. However, the estimate of 25% of people satisfying the means test included in this scenario may be overly conservative.
* Scenario C would cost €3.5 million, excluding VAT, and assumes that 40% of people discharging from wardship would satisfy the means test and that contested applications account for 7.5% of all applications (or 12.5% of those that do not meet the means test).

These estimates are based on several assumptions that cannot be verified at this time and are intended only to serve as a guide as to possible costs associated with this one-off measure, which would be incurred over a two-year period. The Legal Aid Board and General Solicitor for Minors and Wards of Court may be able to provide a more concrete steer on the likelihood of people discharging from wardship satisfying the means test.

**Table 1: Estimate of costs of exempting all adults discharging from wardship from legal aid costs.**

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| --- | --- | --- | --- | --- | --- | --- |
|  | **Scenario A** | **Amount** | **Scenario B** | **Amount** | **Scenario C** | **Amount** |
| Uncontested | 75%  (n=1,050) | €4,147,500 | 65%  (n=910) | €3,594,500 | 52.5%  (n=735) | €2,903,250 |
| Contested | 25%  (n=350) | €2,042,250 | 10%  (n=140) | €816,900 | 7.5%  (n=105) | €612,675 |
| Satisfies means test | 0 | €0 | 25%  (n=350) | €0 | 40%  (n=560) | €0 |
| Total |  | €6,189,750 (ex. VAT) |  | €4,411,400 (ex. VAT) |  | €3,515,925 (ex. VAT) |

1. To satisfy the means test for civil legal aid, a person's annual 'disposable income' must be less than €18,000 and their ‘disposable capital’ must be less than €100,000. [↑](#footnote-ref-1)