



THE MINISTRY OF JUSTICE
AND
CONSTITUTIONAL AFFAIRS

NATIONAL LEGAL AID POLICY

FINAL DRAFT

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ACRONYMS

ADR: Alternative Dispute Resolution

CRC: Convention on the Rights of Children

CBO: Community-Based Organization

DC: Disciplinary Committee

ICCPR: International Covenant on Civil and Political Rights

NDS: National Development Strategy

NGO: Non-Governmental Organization

UDHR: Universal Declaration on Human Rights

INTERPRETATION

In this Policy, unless the context otherwise requires-

Attorney; means person duly admitted to practice as such in terms of the Legal Practitioners Act No. 15 of 1964;

Indigent person; means a person who qualifies for legal aid under the means test

Judicial officer includes a judge, magistrate or a small claims commissioner

Magistrate means any person entitled to preside over a court established under the Magistrates Court Act, No. 66 of 1938;

Legal aid; means the provision of qualitative and sustainable legal information and education, legal training, legal assistance, legal advice, alternative dispute resolution, legal representation and other related and incidental services to an indigent and vulnerable person, a victim or witnesses in criminal, civil and other non-litigious matters by a legal aid provider, subject to certain limitations;

Legal aid services provider; means an individual, center or institution accorded by government to provides legal aid;

Legal aid system; means a national system which provides legal aid whose costs are paid principally out of funds provided by the Government, in accordance with its financial means;

Legal practitioner; means a person duly admitted to practice as an advocate, attorney, notary or conveyancer who has been issued with a practicing certificate in terms of the Legal Practitioners Act, but excludes a firm of practicing attorneys, notaries and conveyance

Legal representation; means representation, including representation in court, by a legal aid service provider;

Means test; means a tool used to determine a whether a person is indigent or can afford their own legal representation or qualifies for legal aid;

Head of the legal aid officer; means the head as appointed under paragraph 6 and includes the deputy head officer or any other officer delegated to exercise duties in terms of the legal aid policy.

Prodeo; means a state supported legal counsel provided for criminal cases attracting capital punishment

Principal Secretary; means controlling officer responsible for the Ministry of Justice

FOREWORD

Eswatini adopted a new Constitution in 2005, which contains a justiciable bill of rights that seeks to promote and protect basic human rights of citizens. Access to justice, fair hearing and a right to legal representation are among the basic human rights expected to be fulfilled by the State. To increase and ensure access to justice, the state aims to provide legal aid services nationally to benefit the marginalized groups.

Eswatini remains one of the few countries in the SADC region that does not have a national policy, or specific legislation that guides the establishment of a legal aid system. The Government through the Ministry of Justice is mandated to ensure access to justice by all citizens, hence the need for establishing a national legal aid system.

A Legal Aid Baseline Survey 2022 indicates that Emaswati find the cost of legal representation unaffordable mostly to the marginalized groups, this impacts on their ability to defend their rights. About fifty-eight percent (58%) of Emaswati stated the desire to benefit from some form of legal assistance, whilst forty percent (40%) specifically singled out legal representation as the type of assistance they would have benefited from. After having conducted these studies, it is evident that the need for legal aid cannot be over emphasized.

It is on this premise that a comprehensive National Legal Aid Policy is presented to support the establishment of a comprehensive national Legal Aid System in line with regional and international conventions and protocols and taking into account the national context and conditions in the Kingdom.

I would therefore implore stakeholders to extend their support towards the realization of the aspirations of the Policy.

Pholile Dlamini -Shakantu

Hon. Minister of Justice and Constitutional Affairs

1. INTRODUCTION

The Government of the Kingdom of Eswatini in aligning itself with its Constitutional mandate in Chapter III which guarantees, protects and promotes human rights and fundamental freedoms for all in Eswatini endeavours to promote and protect basic human rights for its citizens like access to justice. This is a basic principle in rule of law which describes how citizens have equal access to the legal systems in their context. Most contexts have initiatives and programmes designed to provide legal services to populations that may otherwise have difficulty obtaining legal advice and representation. Access to justice is in itself an essential element for the protection and advancement of civil, cultural, economic, political and social rights. If there are barriers (like lack of information, funds etc.) citizens are denied a chance to be heard on crimes and human rights violations committed against them.

To increase and ensure access to justice, the state has to provide legal aid services nationally to benefit the marginalized and vulnerable groups like the indigent, women and children. Legal aid in the context of this policy means the provision of qualitative and sustainable legal information and education, legal training, legal assistance, legal advice, alternative dispute resolution, legal representation and other related and incidental services to an indigent and vulnerable person, a victim or witnesses in criminal, civil and other non-litigious matters by a legal aid provider.

In Eswatini the provision of legal aid services is in sync with the Ministry of Justice and Constitutional Affairs' vision of "A society where Justice, the Constitution and human rights prevail in every aspect". The ministry has to ensure legal assistance for the indigent as part of its goal to ensure equal access to justice for every citizen in the country. It is also an initiative to fulfil the country's obligations to implement important regional and international development frameworks such as the Sustainable Development Goals and various human rights instruments to which the country has committed.

A majority of Eswatini face diverse legal problems, with a resolution often delayed due to lack of quality legal information or representation. This creates a frustration in ensuring timely protection of justice seekers' legal rights as well as implementation of the law, which results in justice either being delayed or denied altogether. Provision of legal aid will ensure that justice is not inaccessible to people because they lack financial means. The document outlines a national policy framework

to establish a legal aid system in Eswatini. Its main objective is to uphold the rule of law by creating access to the justice atmosphere, where legal disparity is no longer a concern.

In developing this policy, the Ministry consulted with various stakeholders including key Government Departments and Non- Governmental Organizations (NGOs) through face-to-face interviews and group discussions. These consultations were in-depth and provided for a more thorough analysis and understanding of the different priorities for the various stakeholders. A literature review was also undertaken. The literature review provided a scan of the relevant and available literature, including regional and international best practices and declarations, UN guidelines and experiences from other jurisdictions. Further, an initial study was conducted in 2011 to measure the level of awareness and knowledge of rights by Emaswati. In 2022 another survey, known as the Legal Aid Baseline Survey was conducted which provided nationally representative data on the types of legal problems that are experienced, types of recourse that are currently used, and the likelihood of people using legal aid if it were availed to them.

This policy document is divided into 5 sections. Section 1 covers the introduction, government's vision and process followed to come up with the policy. Section 2 gives the problem statement and rationale for the policy listing impediments to access to justice. Section 3 spells out the policy guiding principles. Section 4 lists the overall policy goal objectives and policy statements. Section 5 lists the implementation framework detailing mechanisms for policy implementation.

2. PROBLEM STATEMENT AND RATIONALE

Eswatini has enacted several laws to address socio -economic and human right based issues such as Children Protection and Welfare Act (2012), Sexual Offences and Domestic Violence Act (2018) and Persons with Disabilities Act (2018). These legislations also assist indigent and vulnerable groups such as women, children and persons living with disabilities in raising awareness on the rights regarding the protection of children as well as issues on domestic violence. Even though these legislations are in place evidence from the studies conducted reflect that a majority of indigent groups of people are neither aware of what these laws provide or lack the financial resources to access institutions providing legal recourse.

A study conducted in the year 2011 indicated that Emaswati have minimal knowledge on their rights and mechanisms for redress which impede access to justice in Eswatini. The study further

indicated that there are inadequacies of a supporting framework, institutional capacity, skills competence on institutions offering legal aid services and funding.

Findings from a Legal Aid Baseline Survey conducted in the year 2022 indicates that most Emaswati especially the marginalized groups find the cost of legal representation unaffordable, this impacts on their ability to defend their rights. About fifty-eight percent (58%) of Emaswati stated the desire to benefit from some form of legal assistance, whilst forty percent (40%) specifically singled out legal representation as the type of assistance they would have benefitted from if there was a Legal Aid Mechanism in place.

Available literature was also reviewed which provided a scan of the relevant literature, including regional and international best practices and declarations, UN guidelines and experiences from other jurisdictions. The review presented the advantages and disadvantages of various legal aid governance models, delivery modes, qualification criteria, monitoring and evaluation and funding models and concluded with recommending aspects best suited to Eswatini. These aspects formed the basis for the stakeholder consultation framework.

Consultations with stakeholders also revealed that women and other vulnerable groups including children are faced with violations of their rights in a number of justice matters related to family life and property ownership. These violations are linked to domestic violence, as well as discriminatory practices imposed on women and children. It also involves land and property related issues such as denial of property and property grabbing amongst others. As legal education and information on the law and the available legal remedies and protections is not provided in a consistent manner to the population, most cases of women and children's rights violations and gender-based violence are not reported to the formal justice system. In practice some cases are reported in irrelevant and unqualified jurisdictions.

Worth noting is that Eswatini does not have a legal aid system, save for *pro deo* counsel offered by the state in criminal cases attracting capital punishment.¹ Due to the prohibitive costs of counsel, many indigent litigants go through the justice system unrepresented. The injustice and violation of human rights occasioned on such litigants at various stages of the justice system cannot be

¹ Section 21(2)(c) of the Eswatini Constitution Act 001 of 2005.

overemphasized. Other than the *pro deo* legal assistance provided by the State under the criminal justice system, there is no legislation in the country that obligates the state to provide access to justice or legal aid and assistance to indigent litigants.

On another note some entities (NGO's, Law Society and UNESWA) offer some form of legal assistance to Emaswati, however their activities are neither coordinated, documented nor regulated. Moreover, these services are concentrated within urban areas and are unknown to the general public. Also hindering access to justice for the indigent people is the lack of awareness on their rights, entitlement, obligations and responsibilities. Therefore, there is a need for creating a policy that will operationalize legal aid services.

3. GUIDING PRINCIPLES

The implementation of the Legal Aid Policy is founded on the following values and principles: -

- (a) Rule of law: Legal aid is an essential element of a functioning 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 justice system;
- (b) Human dignity, social justice and inclusiveness: The legal aid system serves the indigent people in Eswatini.
- (c) Equality and non-discrimination: Decisions on the granting of legal aid shall be made objectively, based on the means test and interests of justice principle as prescribed in the Legal Aid Policy and shall not be influenced by any discriminatory bias.
- (d) Partnerships: The effective and efficient provision of legal aid services requires the strengthening of cooperation and coordination mechanisms between all categories of Legal Aid Service Providers and with other institutions and stakeholders so as to ensure close collaboration and to maximise the impact of legal aid;
- (e) Transparency and accountability: The legal aid system shall be administered in an open and accountable manner with the engagement and participation of all relevant stakeholders including state and non-state actors in the management structures of the legal aid institutional framework;
- (f) Morality and ethics: The Legal Aid Policy establishes a quality assurance framework for service providers. This will enhance their competence and accountability when delivering legal aid services;

(g) Sustainability: The Legal Aid Policy establishes a legal aid system that is accessible, effective, credible and sustainable. It lays the foundation for the continued and sustained delivery of legal aid services to the poor and vulnerable people, enabling them to claim their rights and seek remedies.

4. POLICY GOAL

The purpose of the Policy is to establish a coordinated national legal aid system for promoting access to justice, by providing affordable, accessible and accountable legal aid services to indigent and vulnerable people.

5. POLICY OBJECTIVES

Objective 1.

To establish a legal aid system that enhances access to justice for the indigent and vulnerable groups in Eswatini.

Policy Measures

In order to attain the above objective, the Government will:

1.1 Establish a legal aid system involving relevant justice stakeholders in complementary legal aid service delivery models; and

1.2 Review and design appropriate application processes and eligibility standards of accessing legal aid.

1.3 create educational platforms that will raise awareness on socio-economic and human rights based issues

Objective 2

To establish the institutional structures of the Legal Aid Office.

Policy Measures

In order to attain the above objective, the Government will:

1.1 Strengthen institutional capacity in order to adequately manage a comprehensive legal aid system.

1.2 Establish committees to support effective administration of the legal aid system.

Objective 3

To strengthen the complementary role of the legal profession in the delivery of legal aid services.

Policy Measures

In order to attain the above objective, the Government will:

1.1 Promote the establishment of a comprehensive pro bono framework for an increased number of legal practitioners to provide legal aid services on a pro bono basis.

Objective 4

To ensure the geographic coverage of the legal aid system by involving legal aid service providers

Policy Measures

In order to attain the above objective, the Government will:

1.1 Decentralize legal aid services by involving the Ministry of Tinkhundla, NGOs, University Legal Clinics and other legal aid providers

1.2 Designate justice centres to increase accessibility of legal assistance within communities

Objective 5

To enhance the competence and accountability of Legal Aid Service providers in ensuring quality of the legal aid services delivered

Policy Measures

In order to attain the above objective, the Government will:

1.1 Establish a quality assurance framework and a regulator for Legal Aid Service providers.

1.2 Recognise the role of Legal Aid service providers, qualification and types of legal aid services provided.

1.3 Re-capacitate stakeholders to enhance their skills in providing legal aid services.

1.4 Establish a reporting framework for all Legal Aid Service Providers.

6. IMPLEMENTATION FRAMEWORKS

6.1 INSTITUTIONAL ARRANGEMENTS

The object for which the Office is established is to provide, administer, coordinate and monitor a national legal aid system that provides legal aid services to legal aid recipients. The following measures are required in the legal aid institutional set-up in order to enable efficient and effective implementation of the Legal Aid Policy.

6.1.1 Mandate and Functions of the Legal Aid Office

- a) The Legal Aid Office shall have the overall responsibility and mandate for the provision, administration, coordination, regulation and monitoring of the whole legal aid system in eSwatini
- b) In order to reflect the widened mandate of the Legal Aid Office, it is proposed that the composition of the legal aid policy shall constitute the following:
 - There shall be an office of the Head of Legal Aid which shall consist of coordinating Officers, and such other officers who shall be responsible for performing such functions and exercise as maybe conferred on them by this policy or any other enactment.
 - The Head of the Legal Aid Office shall perform such functions and exercise such powers as may be conferred on them by this policy and any other enactment.

6.1.2 Appointments of the Head of Legal Aid and Staff

- e) The Head of Legal Aid and staff shall be appointed by the Civil Service Commission in accordance with the Public Service Act No.5 of 2018, or its successor.
- f) The Head of Legal Aid Office shall report to the Principal Secretary of the Ministry.

6.1.3 Qualifications of the Head of the legal Aid Office

g) The Head of the Legal Aid Office shall be a person who possess the following qualifications experience and skills

- LLB
- Admitted by the High Court of Eswatini and has been in practice as an Attorney for a period of 4 to 6 years
- Must possess administrative skills
- Be able to conduct legal affairs

- LLM in administrative Law, MBA and other relevant qualification will be an added advantage

6.1.4. Functions of the Head of Legal Aid Office

The Head of the legal Aid Office shall:

- a) Determine the categories of persons and cases for which legal aid may be granted;
- b) Determine the rules for deciding eligibility for legal aid;
- c) Determine the circumstances in which contributions towards legal aid shall be paid by legal aid recipients and how such contributions shall be calculated;
- d) Establish and manage Legal Aid Centres in places considered appropriate;
- e) Obtain the services of legal practitioners;
- f) Undertake research and training into all aspects of legal aid including investigating and assessing the different methods of financing and providing legal aid;
- g) promote legal awareness among the public including educating communities and the indigent on their rights and obligations in terms of the Constitution and other laws of Eswatini;
- h) Prepare reports on legal aid services for submission to the Principal Secretary.
- i) Develop standard operating procedures, guides for all Legal Aid Service Providers to include but not limited to;
 - Training on conducting Legal Aid Services
 - Accrediting of Legal Aid Service Providers
 - Conducting of means and merit tests

6.1.5 Duty to inform persons on Access to Legal Aid

- a) Police officers, correctional facility officers, prosecutors, judges, magistrates and other law enforcement officers shall inform an unrepresented person in police stations or posts, correctional facilities and courts who appears to have insufficient means to pay for legal services of that person's access to legal aid and of other procedural safeguards and may advise the person to seek legal aid by contacting the Legal Aid Office;
- b) 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 shall be provided to suspects or accused persons in an official form prior to any questioning or at the time of deprivation of liberty;

7. LEGAL FRAMEWORK

In accordance with the institutional arrangements as set up under the Legal Aid Policy, the Government shall facilitate the review and enactment of various pieces of legislation, codes, regulations and guidelines relating to legal aid provision in order to develop a supportive and effective regulatory framework in accordance with the Legal Aid Policy.

8. RESOURCE MOBILISATION AND FINANCING

The Legal Aid Policy recognises that the State endeavours to provide budgetary support for the effective implementation of the policy. The Ministry also endeavours to seek other resources from relevant Development Partners and stakeholders to pursue the establishment of a legal system.

9. ESTABLISHMENT OF A LEGAL AID FUND

There shall be established a legal Aid Fund in accordance with the Finance and Regulatory Framework.

10. MONITORING AND EVALUATION OF THE LEGAL AID POLICY

- a) The Legal Aid Office shall develop a monitoring and evaluation strategy for approval by the Ministry of Justice so as to provide a systematic and continuous assessment by the Legal Aid Office of the progress made in the implementation of the Legal Aid Policy, combined with periodic external evaluation by the Ministry of Justice to analyse the effectiveness, efficiency, relevance, impact and sustainability of the Legal Aid Policy;
- b) The monitoring and evaluation strategy shall outline the specific roles, tasks and responsibilities of the different Legal Aid Service Providers and other institutions in terms of information gathering and transmission to the Legal Aid Office.

11.DISSEMINATION OF THE LEGAL AID POLICY AND COMMUNICATION OF LEGAL AID SERVICES

Upon adoption of the Legal Aid Policy, the Legal Aid Office shall disseminate information on the Legal Aid Policy through various communication channels including Government Website.

12. POLICY IMPLEMENTATION RESPONSIBILITIES

Implementation Plan				
Proposed Policy Statement	Proposed Measures	Responsibility	Time Frame	
Adoption of Legal Aid Policy	□ Tabled in Cabinet	Ministry of Justice and Constitutional Affairs	Immediately after stakeholder approval	
Legal Aid office is properly constituted and set-up.	<ul style="list-style-type: none"> • Budget Budget/programme Estimate • Recruitment of Staff 	Ministry of Justice and Constitutional Affairs, Ministry of Finance and Ministry of Public Service	Immediately after Legal Aid Policy is approved in Cabinet	
Decentralize service provision	□ Office accommodation	Ministry of Tinkhundla and Judiciary	Immediately after legal Aid Policy is approved in Cabinet	
Legal Aid Guide is developed along with detailed budget	□ Policies and processes are shaped, including SOP.	Head of Legal Aid	Immediately after Legal Aid Office is constituted and established	
Develop & Review of Legal Framework	□ Amend the Legal	MOJCA, Ministry of	Immediately	

Implementation Plan				
Proposed Statement	Policy	Proposed Measures	Responsibility	Time Frame
		Practitioners Act • Develop Legal Aid Bill • Develop Legal Aid Fund Bill • Review Court Rules to accommodate operation of legal aid system.	Finance, Judiciary and Law Society	upon adoption of the Legal Aid Policy

LEGAL AID OFFICE ORGANOGRAM

