SUBMISSION TO OIREACHTAS COMMITTEE ON JUSTICE AND EQUALITY

Introduction

I would like to thank the Committee for inviting me to make this submission to them on the issues of access to justice and costs. I lecture and have published in the area of public interest law which examines the use of legal services and public advocacy to advance the cause of minority or disadvantaged groups and individuals. I am also a director of the Mercy Law Resource Centre which provides legal aid and advice in the area of social housing and related social welfare law to persons who are homeless or threatened with homelessness and which also advocates for change in laws and policies that adversely affect our client group.

As an important preliminary point, it may be worth distinguishing between access to justice and access to the courts. Access to the courts is only one element – though admittedly an important one – of access to justice. It is possible for lawyers to assist low income individuals and communities without having to have recourse to the courts. In particular, the strategic model of legal aid, of which I will say more shortly, does not confine itself to the use of litigation.

Barriers to access to justice

Turning to the issue of barriers to access to justice,[1] in my opinion, the analysis of this issue presented by the Committee on Civil Legal Aid and Advice (the Pringle Report) in 1977 remains largely relevant today. The Committee concluded that there were four factors which appeared to deter low income individuals from availing of legal services:

> "(a) the belief that the cost will be beyond their reach,
> (b) lack of knowledge of the types of service and doubt about the relevance to their problems of the services of solicitors - it is suggested, for example, that solicitors are trained only to handle legal difficulties which are of concern to the better off (property rights as distinct from social welfare rights, expertise in handling court proceedings but not tribunal proceedings),
> (c) social underprivileged persons are reluctant to approach solicitors because they often find the atmosphere of a solicitor's office "intimidating" - there is what the Incorporated Law Society describe as a "psychological barrier" between socially deprived clients and solicitors which presents both with immediate communications difficulties, and
> (d) difficulty in reaching solicitors' offices, particularly in Dublin where they are generally situated in the central business area."[2]

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[1] In these comments, “legal aid” refers to representation by a solicitor or barrister in civil proceedings while “legal advice” refers to any written or oral advice provided by a solicitor or barrister.

[2] The Pringle Report, pp.38-9. It should be noted, however, that this conclusion was based on evidence submitted to the Committee by various bodies and individuals. The Committee did not commission any empirical research into this issue. However in empirical research subsequently carried out in Ballymun in 2002-3, Sue Gogan identified the following factors as impeding access to legal

While the last factor is probably not as significant now as in 1977, given the significant increase in the number of solicitors' firms now operating in the country, the first three barriers continue to impede access to justice. Empirical research in the U.K. also raises the possibility that the nature of the problem experienced may also be a relevant factor in determining whether or not the services of a lawyer are sought. In particular, cases involving "diffuse" interests, i.e. collective or fragmented interests in areas such as environmental or consumer protection, raise special difficulties.[3]

People with disabilities face additional obstacles to accessing legal services. Previous witnesses appearing before the Committee have already drawn attention, in this context, to s.42 of the Irish Human Rights and Equality Commission Act 2014 which requires all public bodies to have regard to the need to eliminate discrimination, to promote equality of opportunity and treatment of its staff and the persons to whom it provides services and to protect the human rights of its members, staff and the persons to whom it provides services. This is clearly relevant to the manner in which services are provided to persons with disabilities. However in addition to s.42, note should also be taken of the decision of Hogan J in In *D.X. v Judge Buttimer* [2012] IEHC 175, wherein he held that the defendant's refusal, based on her understanding of s.40(5) of the Civil Liability and Courts Act 2004, to permit a litigant with a speech impediment to be assisted in the course of matrimonial proceedings by a friend familiar

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services: the fact that the legal services were not provided in the locality, the intimidating nature of the legal culture, the difficulty in arranging child-minding to enable clients to meet with legal advisors, transport difficulties, difficulty in understanding legal language, unsuitable hours of business during which legal services could be accessed and the cost of such services – **Law from a Community Perspective: Unmet Legal Need in Ballymun** (Dublin, 2005) at p.15**.** In 2003, the then Northside Community Law Centre commissioned a survey of unmet legal needs in its catchment area that identified a need on the part of community groups for advice and training in respect of housing, family, employment, education and health law – see **NCLC Annual Report 2003** at p.16. A limited survey on the unmet legal needs of users of the Citizens' Information Board was carried out by Dr. Moling Ryan in 2006 - see "Access to Justice and Unmet Legal Needs" (2008) 26 ILT 325. His survey found that, during the previous three and a half years, over 52% of the 200 respondents had experienced problems in relation to consumer, employment, social welfare, money/debt, anti-social neighbours, rented accommodation and family issues. One in three of those experiencing problems took no action, mainly because of uncertainty as to their rights or a sense that taking action would not resolve the problem. In 2008, a survey of community organisations carried out on behalf of the Ballymun Community Law Centre identified housing, family law, debt, social welfare and employment as the areas in which there was the greatest need for legal services – **Ballymun Community Law Centre Annual Review 2008** at p.1. The following year, FLAC published a report entitled **"Civil Legal Aid in Ireland: Forty Years On"**, one chapter of which examined unmet legal need in an inner city community in Dublin. This survey indicated that there was unmet legal need in that community in relation to public housing law, social welfare law and domestic violence and that the principal barriers to accessing legal services were a lack of awareness that the individual's problem had a legal dimension, costs, literacy and a belief that the person would be unsuccessful in pursuing a claim. More recently, research into unmet legal needs in a number of disadvantaged communities in Limerick identified a pressing need for legal advice in relation to housing issues, child law, criminal law, family law, social welfare, health and debt – see **Community Consultation Report: Unmet Legal Need in Limerick** (Limerick Community Law and Mediation Centre, 2013) at pp.13-16.

[3] According to Cappelletti and Garth, "The basic problem they present ... is that either no one has a right to remedy the infringement of a collective interest or the stake of any one individual in remedying the infringement is too small to induce him or her to seek enforcement action." **Access to Justice**, vol.1, book 1, (Sijthoff/Giuffre, 1978) at p.18.

with his manner of speaking amounted to a breach of the constitutional guarantee of equality. He said, at para.14:

> In practical terms, [Article 40.1 requires] that the courts must see to it that, where this is practical and feasible in the circumstances, litigants suffering a physical disability … are not placed at a disadvantage as compared with their able-bodied opponents by reason of that disability, so that all litigants are truly held equal before the law in the real sense which the Constitution enjoins.

This clearly imposes a constitutional obligation on the courts to make reasonable accommodation for litigants with physical disabilities to ensure that they are held equal before the law.

Strategic vs service models of legal aid

A comprehensive response to these barriers would require the provision of free, or heavily subsidised legal services, a focus on raising awareness of legal rights and an attempt to overcome the psychological/cultural barrier that exists between low income individuals and communities, on the one hand, and the legal profession, on the other.

In my opinion, such a response is best exemplified by what is known as the “Strategic Model” of legal aid. According to Zemans, a strategic model of legal aid is

> "orientated to identifying the significant social problems facing the community it is serving. While dealing with the inevitable daily problems, a strategic legal-services programme attempts to develop a long-term approach of research, reform and education to deal with the more fundamental issues. Rather than handling cases which are relevant to the lawyer's experience, a strategic programme sets priorities in one or several areas of concern to a particular community such as the environment, housing, land-ownership, occupational health, or immigration. In concert with the geographic community or the community of interest, the professional will consider collective issues or the complaints of a class of individuals."[4]

In an attempt to counteract the psychological/cultural barrier that exists between low income individuals and communities and the legal profession, law centres operating a strategic model of legal aid often locate their services in disadvantaged areas and, in the past, sometimes involved community representatives in the governance of the centre.

In contrast, service models are concerned exclusively with assisting individual clients who seek legal assistance in order to resolve their own difficulties. The difference

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[4] Zemans, "Recent Trends in the Organization of Legal Services" (1985) *Anglo-American Law Review* 283, pp.292-3.

between these two models of legal aid is reflected not only in contrasting objectives but also in different methodologies. In particular, the strategic model does not confine itself to the conventional methods of lawyers in private practice as a means of advancing the interests of marginalised clients but also embraces such tactics as political lobbying, public education and community action. In the Irish context, the strategic model is the dominant model among NGOs while the Civil Legal Aid Act 1995 essentially provides for a service model of legal aid.

Cost Benefit analysis of legal aid

A recent report published jointly by the World Bank and the International Bar Association, **A Tool for Justice: The Cost Benefit Analysis of Legal Aid** (September 2019) makes a strong case that failing to provide adequately for legal aid is a false economy. Thus it states:

> "The price of failing to address the global justice gap is high. Not providing legal aid can be a false economy, as the costs of unresolved problems shift to other areas of government spending such as health care, housing, child protection, and incarceration. For example, a study for Canada estimates the cascading costs of unequal access to justice on public spending in other areas (e.g. employment insurance, social assistance and health care costs) to be approximately 2.35 times more than the annual direct service expenditure on legal aid. [See Farrow et al, *Everyday Legal Problem and the Cost of Justice in Canada: Overview Report* (2016) - http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf] In Australia, numerous studies show that there are net public benefits from legal assistance expenditures. [See Law Council of Australia, *The Justice Project Final Report* (August 2018, p.15.) https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Justice%20Project%20_%20Final%20Report%20in%20full.pdf] Investments in legal aid can lead to significant government savings through avoided cost of arrest, conviction, incarceration, probation, and post-prison supervision. In addition, public investments in legal aid are also found to generate net savings in terms of avoided shelter/housing costs. Studies find significant net economic benefits, even in the short term, including immediate benefits to clients and cost-savings to governments. Moreover, many studies may under-estimate net benefits due to short time horizons and conservative assumptions."[5]

While no comparable research has been carried out in this jurisdiction as far as I am aware, one imagines that a similar case could be made in relation to the provision of legal aid and advice here.

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[5] **A Tool for Justice: The Cost Benefit Analysis of Legal Aid** (World Bank Group, September 2019), p.8, available here http://documents.worldbank.org/curated/en/592901569218028553/pdf/A-Tool-for-Justice-The-Cost-Benefit-Analysis-of-Legal-Aid.pdf

Statutory Scheme of Civil Legal Aid and Advice

In my comments, I wish to focus on the statutory scheme of civil legal aid and advice operated by the Legal Aid Board.[6]

Section 5 of the Civil Legal Aid Act 1995 originally provided:

> "The principal function of the [Legal Aid] Board shall be to provide, within the Board's resources and subject to the other provisions of this Act, legal aid and advice in civil cases to persons who satisfy the requirements of this Act." [7]

It is clear from the 1995 Act that the model of civil legal aid operated by the Board is a service model, focusing on the needs of individual clients rather than on the issues faced by disadvantaged communities, be they geographic communities or communities of interest. Thus, the Board cannot provide legal aid for test cases or for representative actions – s.28(9).

Under the Act, the Board is given no explicit role in relation to advancing social and legal reform. So, for example, as far as I am aware, the Board does not provide any analysis of the actual impact of legislation affecting their clients nor does it highlight areas in need of law reform.

More fundamentally, in my opinion, the service model operated by the Board is incapable of addressing all of the barriers to accessing justice that were identified in the Pringle Report. Thus it is not empowered to provide educational programmes to raise awareness of legal entitlements among the general public and neither is it tasked with attempting to address the psychological/cultural barrier that exists between disadvantaged communities and individuals and the legal system in the delivery of its services.

That said, the Board clearly plays an important role in the delivering of civil legal aid to thousands of individuals. However, even within the context of the service model provided for in the 1995 Act, the statutory scheme has a number of significant limitations, of which I wish to highlight three.

First, the Board cannot provide legal representation before tribunals with the exception of the International Protection Appeals Board dealing with appeals against decisions

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[6] It should be noted that the Board also has responsibility for the administration of a family mediation service and for the administration of various criminal legal aid schemes, namely, the Garda Station Legal Advice Scheme, the Legal Aid – Custody Issues Scheme and the Criminal Assets Bureau Ad-hoc Legal Aid Scheme. It is envisaged that, in time, responsibility for the main Criminal Legal Aid Scheme will be transferred to the Board.

[7] Section 5 was amended by s.54 of the Civil Law (Miscellaneous Provisions) Act 2011 to add the provision of a family mediation service to the principal functions of the Legal Aid Board.

relating to applications for asylum.[8] Thus persons appearing before a social welfare appeals officer, or the Workplace Relations Commission, or the Residential Tenancies Board cannot avail of legal aid under the statutory scheme.

Second, the statutory scheme does not apply to disputes concerning rights and interests in or over land (subject to certain qualifications). On the face of it, this exclusion would seem to prevent the Board providing legal aid to public sector tenants in dispute with a housing authority and it may also preclude the Board from offering legal representation to homeless people and persons seeking public housing. At minimum, the position here needs to be clarified and, if necessary, the Act amended to ensure that cases concerning actual and threatened homelessness are not excluded from the scope of the statutory scheme.

Finally, there is an ongoing issue relating to waiting periods before a legally aided client is provided with their first consultation. To put this issue in its proper context, it should be noted that this problem does not arise in relation to cases of domestic violence, child abduction, cases involving applications by the State to take children into care and cases with statutory time limits close to expiry which are all treated as priority cases. It should also be acknowledged that, since 2013, there has been a steady reduction in the number of applicants waiting for legal services. However the latest figures produced by the Board (for October 2019) indicate that, at one centre, some people have waited up to 58 weeks for their first consultation, at two others, the waiting period exceeded 40 weeks while at seven others it exceeded 25 weeks. In fourteen out of the Board's thirty centres, the delay in getting a first consultation still exceeded the 4 month period endorsed as appropriate by Kelly J (as he then was) in O'Donoghue v Legal Aid Board [[2006] 4 IR 204. This suggests to me that the Board is currently under-resourced given the extent of the demands being placed on it. In particular, there is anecdotal evidence that the Board is encountering difficulty in recruiting solicitors as the salary scales are not comparable to what is being paid to solicitors in the private sector and in other parts of the public sector. If the Board does not have a full complement of solicitors, inevitably this will exacerbate the problem of delay.

Litigation and rules of procedure

Finally, I wish to address briefly two points relating to litigation and rules of procedures.

a) Class actions

One of the characteristics of public interest litigation is that, as the name implies, the court's decision potentially affects many people apart from the particular parties to the

[8] Legal aid before Mental Health Tribunals is provided by the Mental Health Commission pursuant to the Mental Health Act 2001.

case. Notwithstanding this characteristic of such litigation, however, there are only a limited number of situations in which the Irish legal system provides any expeditious manner for extending the benefits of a judicial ruling to those who are not party to the original litigation but whose factual situation is on all fours with that of the successful litigant.[9] In the absence of a legislative or administrative decision to apply such a ruling to this extended class, members of that class may themselves have to bring legal proceedings and invoke the doctrine of precedent in order to avail of the benefits of the original court ruling. This highlights the need for providing for a class action in Irish law. The existence of such a device could also act as an effective counterweight to a tactic sometimes employed to frustrate litigation targeting unlawful practices on the part of the State. This is the tactic of settling with the individual litigant bringing the case, coupling this with a confidentiality agreement. An example of this may be seen in the response of the Department of Health over a period of thirty years to challenges to its policy of charging medical card holders in long-stay care in Health Board institutions. According to the Travers Report,

> Over the years since 1976, a significant number of legal challenges have issued against the practices of the Health Boards in levying charges against persons in long-stay care in Health Board institutions, but otherwise in the 'full eligibility' category under the Health Act 1970. The files of the Department of Health and Children indicate clearly that when Health Boards from time to time sought advice on whether they should seek to resist these challenges by seeking court adjudication on the issues, the advice tendered by the Department over the years has generally been not to go to court on the grounds of an expectation of a Court adjudication against the validity of the practices.[10]

Such a strategy could not prevail, however, against a class action as settlement of such a claim would benefit all persons adversely affected by the challenged policy. According to Tony Prosser,

> ...The chief advantages of the [class action] procedure are that it enables an authoritative resolution of an issue to be made and hence avoids piecemeal and perhaps inconsistent decisions in a number of cases concerning the same issue. It may prevent ... the 'buying off' of potential test cases [through offers of settlement] as it would be impossible to buy off the whole class without effecting a policy change and thereby, in effect, conceding the case. Finally,

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[9] The Law Reform Commission lists situations in which public officials, such as the Attorney General, the Director of Consumer Affairs or the Competition Authority, are empowered to institute litigation on behalf of a wide group of affected individuals, and actions taken by campaigning organizations – see **Report on Multi-Party Litigation** (LRC 76-2005), paras.1.03-08 - while Heffernan lists litigation in relation to trusts and estates, fatal accidents, consumer grievances and derivative actions in company law - Heffernan, "Comparative Common Law Approaches to Multi-Party Litigation: The American Class Action Procedure" (2003) 25 DULJ 102 at 120 - to which one could add litigation declaring a legislative or administrative action to be unconstitutional as in such cases, the impugned act would cease to be effective in all situations from, at the latest, the date of the judgment.

[10] ***Interim Report on the Report on Certain Issues of Management and Administration in the Department of Health & Children associated with the Practice of Charges for Persons in Long Long-Stay Care in Health Board Institutions and Related Matters*** (March 2005), para.3.42.

> the decision will apply to the whole of the class, so in the case of a successful challenge there will be a clear cut liability towards them all.[11]

However the class action is not without its difficulties. In particular, there is always concern that a conflict of interest may arise between the interests of the class representative and the interests of absent class members. In addition, the use of a class action may, in some circumstances, oversimplify the legal relationships between the members of the class *inter se* and between the members of the class and the opposing party and, indeed, one should not underestimate the difficulty in identifying an appropriate class. However, even allowing for these difficulties, a class action procedure as recommended by the Law Reform Commission in 2005[12] would be a welcome addition to Irish law.

One alternative mechanism with a similar outcome might also be mentioned.[13] Applicable only to cases in which the class of beneficiaries can be identified from files held by a public body, such as, for example, social welfare claims, this approach requires a public body found to be in breach of its legal obligations to review all cases in which such unlawful behaviour occurred and, where appropriate, to compensate the individuals affected. In this context, it is interesting to note that, following a number of successful claims for arrears of welfare taken by welfare claimants against the then Department of Social Welfare pursuant to Directive 79/7/EEC on the progressive implementation of the principle of equal treatment of men and women in matters of social security, the Department did eventually undertake to review its own files to try to identify the other welfare claimants affected by its unlawful actions, in addition to running an extensive advertising campaign seeking to make potential claimants aware of their entitlements.[14] Given the fact that most litigation on behalf of disadvantaged individuals and groups in this jurisdiction is likely to be taken against public bodies, acceptance of this duty to review files would seem to be a very effective way of disseminating the benefits of a judicial ruling among the wider population in those cases in which the class of beneficiaries can be identified from the files reviewed.

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11 Prosser, **Test Cases for the Poor**, (London, 1983), p.11.

12 See ***Report on Multi-Party Litigation*** (76-2005), para.1.46. It should also be noted that the European Commission, in a non-binding recommendation, has called on member states to adopt collective redress mechanisms at national level for both injunctive and compensatory relief addressing breaches of EU law – see art.1(1) of Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (11 June 2013) (2013/396/EU). It also recently published a draft Directive providing for representative actions in consumer cases.

13 See further, Cousins, "The Protection of Collective Rights Before the Irish Courts" (1996) *Irish Law Times* 110 and 134.

14 A similar undertaking was given by the Department in relation to claimants affected by an Appeals Officer's decision that Deserted Wife's Benefit came within the scope of EC Regulation 1408/71 so that social insurance contributions paid in another EC country could be taken into account in order to qualify for the benefit - see *FLAC NEWS* (Oct-Dec.1993), Vol.4, No.1, p.2.

b) Protective costs orders

A protective costs order is an order granted at a preliminary stage in legal proceedings directing that the applicant should not be held liable for the costs of any other parties to the proceedings (or fixing a limit to such potential liability) in the event that the applicant should eventually lose the case. Such an order would clearly be of great assistance to a litigant of no, or very modest, means seeking to challenge in court some aspect of public policy where the outcome could have implications for many other people. In *Village Residents' Association Ltd. v. An Bord Pleanála*,[15] Laffoy J. accepted that such an order could be granted pursuant to O.99, r.5 of the Rules of the Superior Courts 1986 which provided that costs could be dealt with by the court at any stage in the proceedings. However, in line with English authority on this type of order,[16] such orders may only be granted where, *inter alia*, the litigation raises public law issues of general public importance where the applicant has no private interest in the outcome of the case – see *Village Residents' Association Ltd. v. An Bord Pleanála*[17] and *Friends of the Curragh Environment Ltd. v. An Bord Pleanála.*[18] This condition is very restrictive and perhaps the Committee might consider recommending that this jurisdiction be broadened to include cases that raise public law issues of general public importance even though the litigant might also benefit personally from the outcome of the case. Such a modification would enable impecunious litigants to pursue cases concerning the operation of public policy where the outcome of the litigation would have implications not just for the litigant herself.

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15 [2000] 4 IR 321, [2001] 2 ILRM 22.

16 See *R. v. Lord Chancellor, ex p. CPAG* [1999] 1 WLR 347; [1998] 2 All ER 755 and *R. (Corner House Research) v. Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600.

17 [2000] 4 IR 321, [2001] 2 ILRM 22.

18 [2006] IEHC 243, (14 July 2006) HC. There would appear to be only one instance of a protective costs order being granted by an Irish court. According to media reports, in *Schrems v Data Protection Commissioner*, 15 July 2014, Hogan J granted such an order restricting the plaintiff's liability to costs, were he to lose his case, to €10,000.