

PIL12

# **A Strategy for Public Interest Law & Litigation in Ireland: A Preliminary Position Paper**

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## **Introduction**

The work of Community Legal Resource (CLR) on behalf of FLAC involves the preparation of a report on how Public Interest Law & Litigation (PILL) should be developed and supported in Ireland and the preparation of a detailed funding proposal for the progressive implementation of PILL in line with that report.

The preparation of the report involves two consultation exercises:

- (1) Detailed interviews with key stakeholders involved directly in the delivery of legal services, legal education, advocacy work and enhancing the protection of human rights
- (2) A mapping study of organisations involved in aspects of PILL and / or with a potential to contribute to the development of PILL. The study involves a questionnaire with a number of follow-up telephone interviews

The deadline for the completion of the report and the funding proposal is the end of July next. This is a tight timeframe and means that of necessity the consultation process must be somewhat restricted in terms of the numbers of organisations contacted directly. However information on PILL has been disseminated by FLAC to over 400 organisations and the questionnaire has also been widely signalled. CLR urges all interested players to respond to the questionnaire as soon as possible. If your organisation has not seen information about the questionnaire and wishes to be involved please contact any member of CLR (or FLAC). We are most anxious to receive comments, suggestions or queries for more information - a central theme of this position paper is that PILL can only be truly effective if a strong coalition of all those involved is built.

The consultation process is ongoing and therefore this position paper can only provide some preliminary thoughts on the process to date.

If we are to develop the PILL project it is essential that we try to construct a shared vision of how that project might evolve in the short to medium term. Therefore the position paper attempts to put forward some broad principles concerning the project and its structure and to identify the broad options for the project's development. We emphasise that the principles outline are intended to further the debate and we look forward to your input to-day and during the remainder of the consultation process.

## 1. Outcome - what PILL aims to achieve

Public interest law and litigation is described as ***a way of working with the law for the benefit of vulnerable and disadvantaged people and for the protection of their human rights.***

The above definition raises the issue of who will decide how the law will work for the benefit of vulnerable and disadvantaged people? This question brings us even at this early stage of our position paper to a core principle of how we see PILL developing. There is a need to develop a collective vision, as Robert Garcia has written - "*a collective vision reflects what people want and collective ways of getting it*"<sup>1</sup>

There has not been to date a national dialogue between organisations working with marginalised communities and lawyers, although we have the experience of certain NGOs including particularly the independent law centres to build on. For example, generally what has been written on community development work and poverty issues in Ireland has ignored the potential of public interest law to impact on these issues. Likewise the potential for community development principles to impact on a rights based approach is generally not recognised by the legal profession. However, if we are to see PILL as a way of working with the law that benefits marginalised communities and protects their human rights we need to build on experience to date and encourage a coming together to build a collective vision - ownership of the project needs to be broadly based.

Community organisations need to engage with the law and the legal system. It is true that the language is often inaccessible, the procedures at times bizarre and the culture may appear to be from another planet, but nevertheless this should not prevent a recognition that the law can have a positive impact on people accessing rights across a range of issues from housing to planning to health etc. Equally lawyers need to engage with the communities of vulnerable and disadvantaged people - they need to know the demographics, economy, organisations, leadership and history of those communities, if they are to provide effective legal assistance and representation where they are needed.

There needs to be a recognition that that the community and voluntary sector is a diverse and complex one with a wide spectrum of needs. PILL will need to adopt a variety of approaches and strategies to encourage the disparate elements to engage in the project and to identify their diverse requirements.

Coalition -building emphasises the diverse values at stake to bring stakeholders together<sup>2</sup> The coalition needs to include the legal profession, legal education bodies, government departments and other statutory agencies, NGOs and community / voluntary groups working with vulnerable and disadvantaged people.

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<sup>1</sup> Public Interest Law in Ireland (FLAC) p.107

<sup>2</sup> As above p.107

The definition also refers to PILL working with the law for the "benefit" of vulnerable and disadvantaged people. This undoubtedly means the material benefits that come from access to knowledge of rights and effective enforcement of those rights. But, in addition, the project should give people a real sense of their own power, in effect to alter power relations<sup>3</sup>, where the law is seen to work for the benefit of the marginalised as well as the privileged in society.

**2. Process** - *"A way of working....." what grounding principles should we apply?*

- **Inclusive** of all main players - Legal profession, academics, statutory bodies & NGOs (including, for example, independent law centres, trade unions, information & advocacy services and special interest groups)
- **Build** on existing expertise, experience and structures of the main players
- **Independence** from sectional interests, state and funders
- **Transparency** in decision-making around the operation of the project and the choices that will need to be made regarding the work it will undertake
- **Governance** - the governance of the project should be broadly based and based on best practice principles

**3. Activities** - *the work PILL will undertake to achieve the outcome & with whom*

Public interest law is considered to have four strands:

- **Law reform** - *this can include research on issues of concern, developing reform proposals, lobbying and campaigning - the foundation for this work should be through experience of casework and potential legal issues arising either directly or through close links with NGOs including community / voluntary organisations*
- **Legal education** - *this involves incorporating an awareness of public interest law into third level and professional legal education through, for example, the teaching of public interest law or the development of clinical (i.e. practical) legal education as a structured part of the courses of education. In addition, it involves improving access to third level and professional legal education for students from disadvantaged communities*
- **Community legal education** - *this involves a range of measures to 'demystify' the law and to raise awareness of the law amongst disadvantaged and vulnerable people. Examples include the provision of information materials (for example, in print or on-line); community legal education projects, training, 'Street law' programmes as in the USA and elsewhere which use law students to deliver legal education to members of the public.*

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<sup>3</sup> Public Interest Law in Ireland (FLAC ) p.108

- **Public interest litigation** - *this involves the use of litigation (i.e. the process of bringing a case to court) in a strategic manner to advance the position of disadvantaged and vulnerable groups. It involves a wide range of activities from the identification of an issue, identification of potential cases, preliminary advice, the bringing of the case itself and the implementation of the court's decision. Effective public interest litigation needs an effective 1<sup>st</sup> tier advice network.*

#### **4. Output** - *the direct results of the activities*

Law reform - the areas of law that directly impact on the project's target group include employment protection, social welfare, housing, health services, equality, consumer / debt etc. There are many aspects of such laws that require amendment or further development in order to strengthen and enhance the protection provided. Organisations working with the law on the ground see at first hand the gaps that exist. PILL will empower these organisations by enabling them to access the detail of legislation and to formulate their recommendations for reform through research and other support work. Multi-disciplinary research and analyses including financial, demographic and historical studies provide hard data to support the case for reform<sup>4</sup> It is also important to recognise that law reform work may not always involve legislative change. Equally important and often more achievable are changes in policy and practice, including the interpretation of legislation.

Legal education - firstly PILL needs to work with third level institutions in order to bring law students in contact with the elements of public interest law and encourage them in their further studies and professional development to engage in those areas of law. Clinical legal education will also be encouraged and supported. Secondly PILL will support initiatives such as the Legal Education for All Project (LEAP) in encouraging students from the target group (which to date has been underrepresented in the legal profession) to study law. The success of the innovative LEAP project will depend on the extent to which it is mainstreamed PILL may be ideally placed to help to ensure that the valuable experience and learning through such projects is not lost.

Community legal education - information and knowledge about the law is a source of power to change people's lives. PILL will assist in this process by working with those organisations which are already undertaking valuable work in this area. In addition PILL will support and encourage new initiatives. Community legal education work should also aim to provide a source of training and support that can bring forward a solid base of advocates and para-legals who can work within disadvantaged communities - 2<sup>nd</sup> tier approach

Litigation - where necessary the project will provide the resources or access to resources, such as strategic pro bono work, that can enable the target group to

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<sup>4</sup> Public Interest Law in Ireland (FLAC ) p.107

protect their human rights to services, entitlements and equality through enforcing those rights by way of litigation.

## 5. Structures - *What options should we consider?*

In considering and developing ideas concerning the options in regard to the structure of the PILL project, what criteria should we apply?

- **Effective use of resources** - the structure should maximise the use of existing and additional resources that become available
- **Sustainability** - the structure should provide a basis for receiving funding and other resources that will ensure the effectiveness of project. The structure should also encourage best practice in relation to governance
- **Impact** - the structure should maximise the impact of the project on the lives of disadvantaged people and their communities
- **Accountability** - the structure should ensure accountability by the project to its target communities and participants
- **Co-ordination** - the structure should facilitate co-ordination of activities between all players
- **Flexibility** - the structure should reflect that a PILL strategy will operate on a number of different layers, for example local, regional and national and will involve multiple strands
- **Communications** - the structure should create a clear path of communication between the target group and the legal services. Information concerning issues which may require law reform research, community legal education or litigation should be able to move easily to a source of legal expertise and the response should be delivered in an accessible manner that empowers the recipient.
- **Evaluation** - the structure should incorporate from the outset a system of review and evaluation

In broad terms the options might be summarised as follows:

- Establishing a new organisation that might either (a) lead the strategy and deliver the programme or (b) manage the strategy but deliver the programme in collaboration with other organisations
- Fund an existing organisation(s) that might either (a) lead the strategy and deliver programme or (b) manage the strategy but deliver the programme through other organisations

The options identified in FLAC Report

- Centre for Public Interest Law - linked to a university: (a) to carry out research (b) provide advice and support to independent law centres / others (c)

develop links with community groups in relation to community legal education and (d) teach public interest law to law students<sup>5</sup>

- Public Interest law clearing house<sup>6</sup>
- Legal Policy Officer - meet groups on law reform issues and put them in contact with barrister under Bar Council scheme<sup>7</sup>
- Law schools access programmes<sup>8</sup>
- Clinical legal education<sup>9</sup>
- Public Interest Litigation Fund<sup>10</sup>

CLR is reluctant at this point to comment on detail on any of the above options. The consultation process is on-going and we are very much open to receiving views on the options identified and hearing of new ideas. However subject to that proviso it may help if, based on feedback and comment to date, we give some indication on the debate so far.

Firstly there is a recognition that a successful PILL project should combine a multi-faceted approach that uses the expertise and resources of the key players. So, for example, the various law schools have a major part to play by bringing to the project expertise of benefit to the law reform and legal education strands in particular. However we have not found support for the view that the project could be centred in any particular third level institution. Indeed if we look at the criteria we have listed above this approach might, for example, have weakness from the point of view of accountability and flexibility. One idea that has been put forward is that a network of those interested in PILL within third level institutions to maximise the resources available from the sector for the PILL project.

Secondly there has been interest in and support for the idea of a clearing house approach. However this is not seen as a complete or even major aspect to the project. In order to make the concept work time will be needed to build up contacts with the legal profession and to develop the precise operational structure. This may therefore be part of the solution but only in the medium term. We consider also that the issue of quality control raised at one of the earlier seminars and in addition the issue of accountability require further discussion.

Thirdly we have not as yet found real support for the idea of a public interest litigation fund. There are issues concerning how such a fund would be administered and how such a fund would be perceived by the judiciary. There might be a different view if the fund was financed by the State as part of a recognition that there is a real benefit to society if citizens have access to the courts to raise issues of public interest. This approach could form part of the State's social inclusion strategy..

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<sup>5</sup> Public Interest Law in Ireland (FLAC ) p.34

<sup>6</sup> As above p.66

<sup>7</sup> As above p.33

<sup>8</sup> As above p.34

<sup>9</sup> As above p.34

<sup>10</sup> As above p.34 & Annex 5.1

There is a broad view that for PILL to succeed there needs to be some central driving force that can develop and co-ordinate the diverse range of players involved. The jury is still out on whether that should be a new structure or should be part of an existing structure. There is also some indication of a need for specialised legal knowledge concerning particular issues relating to, for example, members of the Traveller community, people with disabilities, and housing.

In considering the options above and others that may arise in the course of the debate we also need to take into account that developing a PILL strategy is in all probability going to be a gradual process. We need therefore to set short / medium goals that are achievable. We could, for example, start with a developing a network that would begin to build the necessary links between the interests involved - recognising that even informal networks need resourcing.

In addition to agreeing the structural targets we may also need to agree target areas of work that could be prioritised in the initial stages of the project.

These are not easy decisions to make and almost inevitably will lead to disappointment for some who are involved in the process at least initially. It is therefore essential that in reaching these decisions that there is genuine transparency in the process which will show how and why the decisions have been made. It is also important that avenues for consultation and debate remain open - to-day's roundtable is part of that process but not the end.

## **6. Input - *inputs required to make the PILL happen***

(a) Immediate requirement - involvement by all the players in the consultation process through feedback and ideas on how a PILL strategy can develop. In addition thoughts and ideas on the way that the process of debate can continue beyond to-day's event, for example by way of a PILL network.

(b) Existing resources - even the most basic of mapping exercises show that there is a wealth of expertise and experience and willingness to get involved already out there. These resources should be recognised, valued and encouraged to become part of making PILL happen. It is not within the scope of this position paper to list those resources, but for example, we can identify:

- Government Departments - involvement in disseminating information about legislation, for example, the Department of Social and Family Affairs
- Statutory agencies, for example, the Legal Aid Board, Comhairle, the Irish Commission on Human Rights, the Equality Authority and Ombudsman Offices
- Legal Profession - Law Society and Bar Council

- NGOs directly involved in legal service provision, FLAC, independent law centres, Irish Traveller Movement Legal Unit etc
- NGOs involved in advocacy / information work including CICs and centres run by ICTU, MABS and INOU
- Community development and voluntary groups working in communities and with particular groups

This sample list demonstrates the resources that are already available to the PILL project

(c) Additional resources - the resources that will be required will depend on the structure that is adopted and the nature of the probable phasing in of the strategy. The resources required will obviously include finance. However they will also include resources such as the preparedness of the different players to adapt their strategies and work plans in order to take into account the PILL project. Such measures may have resource implications within those organisations.

In considering where the new resources may come from we can look to:

- State involvement - this should include funding but also the type of legislative and policy changes that will remove barriers. For example, there needs to be a review of the existing civil legal aid legislation to address the problems created by barriers to test cases and class actions
- Private funders - perhaps in conjunction with State funding, we are told that Private Public Partnerships (PPPs) are the way forward in infrastructural projects - why not also when it comes to delivering an infrastructure that will protect the rights and services of disadvantaged communities
- Legal profession - many within the profession believe that there is an obligation on it to make a contribution to ensuring that disadvantaged communities have equal access to the law and legal services.
- European Union - CLR is exploring the possibilities of EU support for the PILL project on the basis that the EU has an interest in improving citizens' knowledge of and access to the law ensuring freedom of movement within the EU does not lead to uneven and unequal protection of economic and social and citizenship rights.

## **7. Conclusions**

This position paper is an outline of the principles on which we believe the PILL project should be based and the options that are being discussed for structures and resourcing.

I would like to conclude by highlighting four main themes of the paper:

- Firstly the project should involve a broad coalition of all the stakeholders including the legal profession, academics, statutory bodies, NGOs and target communities
- Secondly the project should be based on the principles of inclusiveness, recognising and valuing existing expertise and experience, independence, transparency and participative governance
- Thirdly we need to keep a focus on the fact that the project involves the delivery of law and legal services to disadvantaged communities across four strands, law reform, legal education, community legal education and litigation. The strategy that is adopted should reflect each of these strands
- Fourthly the project requires adequate resourcing based on a structure that uses those resources effectively, is sustainable, accountable and flexible, while making the maximum impact on the lives of marginalised people. Disadvantaged communities are entitled to expect that all those with a contribution to make will do so in order to ensure the success of the strategy.

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