

**Amicus Curiae:
The Experience of a Statutory Body
Eilis Barry BL, Equality Authority**

**FLAC Amicus Curiae Interventions
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It's very hard to follow the previous two speakers with the same level of optimism for what's happening in the Republic. But I suppose in talking to Phil during the break, he was saying 'you are where we were twenty years ago.' And I'm not sure if we are actually, because I think that their legal aid system twenty years ago was better than the legal aid system we have now.

First of all, I'd also like to thank Michael for continuing to invite me to speak on this. There have been a number of delays in me coming to speak on this, and I would like to thank him for his persistence. And my experience of being briefed by Michael was equally pleasurable.

I'd just like to provide a factual account of the experience of the Equality Authority, to date, in applying to be appointed as *amicus curiae*. And, I am acutely aware that the matter will shortly be back before the Supreme Court so I won't be giving any opinion on the actual judgment of the Supreme Court as I imagine it's a matter that will be canvassed again, the substantive matter.

We have had differing experiences and perhaps surprising experience in relation to *amicus curiae* application. And *amicus curiae* was traditionally disinterested in nature and intended exclusively to assist the court in its determination of a particular point of law.

I'm using a definition from Jowett's Dictionary of English; now, which defines an *amicus* as a 'friend of the court'. That is to say a person, whether they are a member of the bar not engaged in the case, or any other bystander, who calls the attention of the court to some decision whether reported or unreported, or some points of law, which would appear to have been overlooked. And the former Chief Justice Keane in case of [HI](#) and the Minister for Justice, Equality and Law Reform, on the application of the United Nations High Commissioners for Refugees, noted that it was not unknown for a member of the bar in court, to intervene and draw the attention of the court to a decision which might otherwise have been overlooked. As Michael said I practiced at the bar for a number of years and it wasn't unknown. It would be relatively common for members of the bar to make some comment about perhaps a relevant statute.

From the Equality Authority's point of view, I think the use and development of the *amicus curiae*, particularly in anti-discrimination cases, can be linked to developing concepts of equality. And in particular, European anti-discrimination law, which places emphasis on enforcement and remedies, and recognises the limits that are placed on what I call the individual enforcement model; that is the individual having to bring the case and proceed with the case. I think *amicus curiae* applications have the potential to enhance the effectiveness of this model. But whether the potential will be realised or not depends on a number of factors. Firstly, the openness and willingness of the courts to allow *amicus curiae*

applications and I mention the Supreme Court judgment in the *Doherty* case which envisages the power to be used sparingly and exceptionally; which I think mirrors the Northern Ireland experience. I'm not overly concerned about that.

What does concern me, and I think it would be a factor in NGOs in particular trying to pursue *amicus*-type applications, the strength of opposition by potential respondents to such even if they are unsuccessful. And I'm not in any way denying the entitlement of potential respondents to challenge *amicus curiae*-type applications. The very fact in opposing the application will result in considerable delay to the plaintiff. Something which has to be borne in mind by a party seeking to intervene is that your application may result in the case being considerably delayed. And obviously a third factor, is the quality and effectiveness of the *amicus curiae*. And perhaps fourthly, and most importantly the capacity and resources available so that individuals cases can be brought forward and pursued.

Now the two cases in which the Equality Authority was invited to appear as an applicant had been taken by an individual solicitor working with the legal unit of the Irish Traveller Movement. Now I understand that funding for that unit is now under threat; so the development of the *amicus curiae* application simply won't develop if there isn't a significant body of cases out there. As Phil has already described, it's almost a parasitic relationship if there isn't any case in the first place there won't be any *amicus*. And, I suppose this is me being at my most negative. Part of me, as a previously practicing barrister, has a certain concern how the extent and level of debate about public interest law is impacting on the courts. I thought that it was very interesting that the state council went out of their way on several occasions to describe the *Doherty* applicants as a test case, as a public interest type case, seeking to give the impression that it was actually a test case, that there weren't actually plaintiffs behind the case. And I think that there is a danger in that they were always perceived, or sought to be portrayed, as some sort of frolic of the public interest law movement which it certainly wasn't. I would, I suppose, express a note of caution about it as the level of doubt about it; there isn't a proportionate level of cases being taken.

I would also say, unlike Northern Ireland and the UK, procedural rules of the Law Society for solicitors acting for bodies like FLAC and the ITM also need to be sorted out. Now I mentioned earlier that I thought it could enhance the individual enforcement model. What I am talking about is a specific individual right in the case of the equality legislation not to be discriminated against in relation to a list of prohibited grounds including certain prohibited areas. Now, the single case can have extensive legal and social effects. It can establish precedents for other claimants. It can contribute to a culture of compliance, in that other potential respondents may change how they behave on foot of the cases; and, it tests and clarifies the content of existing laws. It raises issues publicly and it can attract considerable publicity and prompt national debate. Thus heightening the awareness of the legislation and hopefully to seek compliance with the legislation.

But there are inadequacies with the individual model. The ones that are most relevant to *amicus curiae* type applications can be reiterated as follows. Firstly, you have to have the individual who is prepared to bring the case, who can withstand the consequent financial and other costs. And there may be problems for individuals and groups who haven't traditionally participated in public enforcement mechanism, to be able to actually bring cases to the courts.

I think this difficulty is exacerbated by our inadequate legal system, particularly in comparison with the UK. I talked to Phil at the beginning; he couldn't believe that test cases were excluded. In the UK jurisdiction they seem to be almost actively promoted in comparison. And then a potential claimant will face things like evidential burdens. And then there's the ability and capacity of the individual to compete once they get the case off the ground. And the question of delay will again have an impact and depending on the circumstances, claimant's cases can then be settled or they can be overturned by litigation. [The Supreme Court itself has acknowledged the weakness of this adversarial model in the above case, where it was stated that it is an unavoidable disadvantage of the adversarial litigation in the common law system that the courts are almost always invariably confined in their consideration to submissions of public materials such as are relevant to parties elected to place before the court itself, in this context is itself limited which would be advantageous to written and all submissions of a party with a *bona fide* interest in the issue before the court which cannot be described as a meddling busybody.](#)

As the experience of other common law jurisdictions demonstrate, such an intervention is particularly appropriate at a national appellate level, in cases of a public law dimension. And I would have to agree with Karen, if the case waits till the appellate level you may have lost an opportunity to canvass certain points. I think things have crystallised by the time they come on appeal. The Chief Justice also noted in that case, the role of the *amicus* in other jurisdictions had changed considerable, and recognised that the *amicus curiae* is no longer expected to be wholly disinterested in the outcome from litigation.

Now there are a number of provisions in the three directives; particularly, on the operation of the Equality Authority, that I want to highlight. There has been a move in the directives away from, at least in the recognition of difficulties that individuals face in the bringing of cases, so you have protective measures around victimisation, provisions in the burden of proof, positive action measures, and as I said earlier there is great emphasis on remedies and enforcements. Now the Race Directive and amended gender equal treatment and the equal access to goods and services directive require member states to designate a body or bodies for the promotion of equal treatment. They also have to be able to provide assistance to victims of discrimination, and they have to be able to conduct independent surveys and publish independent reports. In addition, a number of the directives require member states to ensure that associations, organisations or public legal entities have an interest in ensuring that the provisions of the directive are complied with and may engage on behalf of, or in support of the complainant with his or her approval in any judicial or

administrative procedure provided the enforcement of the obligations. So the directives themselves recognise the need for the existence of *amicus curiae* type applications. Of course it doesn't stipulate that in the directives to leave it up to the member states to lay down criteria for which NGOs should have a legitimate interest and set out the procedural rules.

In Ireland, unlike Northern Ireland and the UK, we don't have statutory provisions for rules of court providing for the appointment of *amicus curiae*, except in relation to the Irish Human Rights Commission and s.8 of the Human Rights Act 2000. The Equality Tribunal is the body established to hear claims of discrimination under both the Equal Status Act and the Employment Equality Act, and appeals under the Employment Equality Act will be heard by the Labour Court. Now both Acts, the Equal Status Act and Employment Equality Act, provide that the Equality Tribunal and the Labour Court investigate the cases and hear all persons appearing to the Director or the Labour Court as the cases may be. So you do have statutory provision for the Equality Tribunal and the Labour Court. They are **obliged** to hear, it's not even **may** hear, any party who is interested and desires to be heard. So, there is room in the equality legislation for the *amicus curiae* type application. It's not something which has been exploited. Primarily, as Karen was saying, if you don't know about the case, it's too late to intervene by the time you get to see the recommendations. So there's no system of notifying relevant NGOs or bodies like the Equality Authority to intervene so that's something that the Equality Authority and the Labour Courts themselves could consider notifying the relevant body.

Now as I've said earlier, we've had differing experiences in relation to *amicus curiae* type applications. In January 2006, in proceedings entitled **Lawrence and others vs Mayo County Council**, the Authority was given liberty to appear as *amicus curiae* in High Court proceedings brought by a Traveller family against a number of respondents including the local authorities, the commissioner for the guards, the DPP, the Minister for Justice and the Attorney General. The case taken by the Traveller family raises a number of issues. The failure of the relevant housing authorities to meet their housing needs and they are also contending that the Criminal Justice Public Order Act has a disproportionate and discriminating impact on members of the Travelling Community. Now this Act [criminalizes](#) and gives the Gardaí broad powers in relation to arrest and removal of Caravans. The Authority was given leave to appear in relation to the application and interpretations of the Race Directive, should it arise in relation to the case. Now the applicants haven't pleaded, either the Equal Status Act or the Race Directive, and when they sought to have their pleading amended the judge said that the amendment was unnecessary, that they were matters of law. And the Authority making the application to appear as an *amicus* relied on the provisions of the Race Directive, about how Member States have to set up an equality body, which has to have a function of promoting equality and also on the provisions the State has to designate bodies and to allow people to appear either in support of or on behalf of the complainant.

The Equality Authority, unlike the Human Rights Commission, doesn't have express power to intervene as an *amicus curiae* with a number of stated explicit powers in the legislation: to work towards the elimination of prohibited conduct, to provide information to the public on the operation of the Act and to make law reform proposals. Now the Authority can also assist individuals who they consider have been discriminated against and also initiate proceedings in its own name. Originally it thought that it was necessary to look at provisions of the Race Directive and in particular the two articles I've been talking about the *locus standi* article and the specialised body article but that didn't emerge as necessary ultimately in the Supreme Court.

The rationale of the Authority was, if the Authority had a function in preventing discrimination on grounds of ethnic or racial authority pursuant to the directive, it would seem to follow that it has a competence or capability necessary to do that including the appearing as an *amicus curiae* in proceedings concerning the meaning of the directive and it would seem strange that the body charged with promoting equal treatment didn't have the capability of doing so by advocating a particular interpretation of the directive in a court of law given that this might be one of the most important and effective ways by which the principle could be promoted. In the *Lawrence* case, that's the Criminal Justice Case didn't oppose the application of the authority to be joined and the case has yet to come up for hearing. So it's difficult to assess how effective involvement of the Authority will be.

However, in *Doherty and others vs South Dublin County Council, Minister for Environment, Heritage and Local Government, Ireland and the Attorney General*, these proceedings were brought by two older members of the Travelling community who were in poor health and who were seeking accommodation from the local housing authority through the provision of a caravan. The case made by the applicants was that they were discriminated against as the local housing authority merely provided them with a site and no caravan in contrast with the peoples and members of the settled community who were accommodated in houses. Now in original proceeding the applicant relied on the Equal Status Act and the Race Directive and it was contended that there was discrimination in relation to the provision of accommodation to members of the Travelling community as being contrary to the Equal Status Act and directly affected EU law in particular the Race Directive. It was also alleged that they were in breach of the ECHR and the provision of the Housing Acts themselves. And finally, it was contended that there was a failure to transpose the Race Directive into Irish Law, by failing to amend section 66 of the Equality Acts to render it compatible with the Race Directives. So it was a very complex case from the outset and the applicant again invited the Authority to appear as *amicus curiae*, unlike the earlier application that was opposed very vigorously by the respondents on a number of grounds, in particular that unlike the Human Rights Commission the Authority hadn't been given the explicit power to appear as an *amicus*.

Mr. Justice Quirke, in his judgment of 22 May 2006, stated that he was satisfied that the Equality Authority had a *bona fide* interest in the matter. The respondents had canvassed that Equality Authority did not have a *bona fide* interest. He stated that where there was no statutory provision provided to become *amicus curiae* the court had an inherent jurisdiction where it might be of assistance. And that's what Gerry Whyte was referring to earlier, the inherent jurisdiction of the court to appoint an *amicus curiae* where it might be of assistance. The judge referred to the Equal Status Act and to the Race Directive and was happy that the Authority provides a particular interest or a role which may be of interest to the case. And that it was incidental to the powers and functions of the Authority. He did point out that the assistance would need to be regulated by the court. The matter was then appealed to the Supreme Court.

Initially it was heard by a three- judge court: Judge McGuinness, Judge Mahon, and Judge Macken, and judgment was reserved. On the date judgment was supposed to be given, the court stated that it was a matter of great importance not just for the Equality Authority but for other bodies to discuss the matter, and the matter would then be heard by a full Supreme Court. And in October 2006 Mr Justice Fennelly delivered the majority judgment dismissing the appeals of the Minister for the Environment and affirmed the order of the High Court, of the Equality Authority to act as an *amicus*. Justice Fennelly considered the appellants point that the Authority was a creature of statute and had no part to become an *amicus* in general court proceedings, and he was satisfied that the Authority had statutory authority to apply to act and he found that the powers were well within scope of the general power of the Authority and that was the general power to promote equality and to prohibit discrimination. It wasn't merely ancillary or incidental and he described it as the power of comparatively modest proportions, compared with the general power of the Authority and he then emphasised that the key he accepted that it wasn't relevant to consider to interpret the legislation in view of the race directive he was happy to interpret the powers of the authority using the Equal Status Act alone and not having regard to the provisions of the race directive, so that will be a matter that will have to be considered again.

The judge emphasised that the only issue raised by the applicants was that the Authority has no statutory power to act as an *amicus* and it wasn't assuming the power to assist, that the High Court judge had exercised his discretion incorrectly, and Mr. Justice Fennelly then went on to say clearly this is an issue which will arise in all future cases. It is clear that to use the language of the former Chief Justice it is a power to be exercised sparingly and such cases will be an exception. Ms. Justice Macken delivered a dissenting judgment, and she referred to long established jurisprudence in other jurisdictions where an *amicus curiae* is more common, there is a clear distinction drawn between applying for *amicus curiae* at appellate level and trial level. And that courts, at least where proceedings are adversarial, do not as a rule act to assist one party in proceedings, either by running the case, or by taking steps to appoint strangers to the litigation who in turn seek to assist one party to win over another, and that is why even the role,

and I'm quoting from the judgment now "may be accepted at final appellate level but not at the trial court level."

I think we have seen from our two earlier speakers the courts in the UK are far more open to *amicus curiae*. I know I have read equality decisions where the House of Lords has pointed out, regretfully, that it didn't have the benefit from an intervention from the specialized bodies in the UK.

I think the benefits of such an application by statutory bodies can be seen in the UK where three specialised bodies came together in the case of *Igens Ltd*. This case involved three appeals from the EAT and related to the burden of proof under the Sex Discrimination Act, the Race Relation Act, and the Sexual Discrimination Regulations, the Disability Discrimination legislation and Religion and Belief Regulations. All of these have been introduced in relation to the burden of proof that applied under the various directives, and because of the possible impact of these decisions in these appeals on practices, three specialized bodies came together: the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission. They successfully applied to the Court of Appeal for permission to intervene and the Court of Appeal then took the opportunity to revisit its earlier guidelines on the burden of proof, they're called the Barton Guidelines, and they set them out as an annex to the judgment and that judgment would be used here and is used right across Europe.

I will turn to what the burden of proof provisions in the various directives mean – I think that is a very effective intervention by a statutory body. I think what is striking, and it was striking in today's earlier presentation, is the perceived strategic effectiveness of the *amicus curiae* intervention. I know the Equal Opportunities Commission in the UK have it as part of its litigation strategy and see it as an increasing need to use their legal budget more effectively and a realisation that an intervention can achieve a court decision without the same degree of financial and resource commitment as full assistance to an individual entails and is a useful means of involving the EOC when it was fully represented for example via union.

I know the Disability Rights Commission have also maintained that it's very useful, for example, in a case involving the County Council and two disabled adults the DRC and the two parties were able to agree on the wording of model manual handling policy which was approved by the court. The DRC, also in the case of *Burke and GMC*, the Judge noted the following: that they were able to deploy to the great assistance of the Court a particular and highly relevant, informed expertise which none of the other parties could bring to the task at hand. He also referred to the important role that in appropriate cases bodies such as the DRC have to play in litigation, affording records, the kind of valuable and valued assistance, that courts in the United States were accustomed to receiving from those filing *Amicus Curiae* type briefs. In the Supreme Court Case in *Doherty*, there was a discussion and a review by certain members of the court that the *amicus curiae* applications had gotten out of control and were actually bogging

down the court system so it is interesting that that would be the interpretation of that in the UK.

There are definite disadvantages and I have mentioned some of them earlier. There is the delay that will follow if the application is opposed. Secondly, there is very little control over the running of the case as the case can be resolved, or settled, or go in a direction not envisaged by the body seeking to intervene. For example, in the *Doherty* case, by the time the matter came back from the Supreme Court, the respondents had then made major concessions in relation to the interpretation of the Equal Status Act and it wasn't necessary to pursue the Race Directive implementation point. Karen has already alluded to the comments that were made in the Northern Ireland Human Rights Commission in the Court of Appeal decision, and I'm quoting now, "the public perception might be that the court would be influenced by a government agency not party to the proceedings, costs could be increased and the party would feel aggrieved by the inequality of arms."

Moreover it is undesirable that the Commission should be involved in controversy, and some of the judges in the Court of appeal stage also pointed out that the interpretation of the Human Rights Act wasn't actually that difficult. I think it's important to emphasise that the Equality Authority under the directives and under our legislation is partisan. We have an obligation to promote equality so it isn't something that we can pretend we don't have in coming, and we would be misleading the court to suggest that we don't have an obligation to promote equality. I'm not at all suggesting that the Equality Authority might become a meddlesome busybody and seek to intervene in every case concerning every aspect of the directive or the equality legislation, and I would agree with Karen in her comments in relation to the Human Rights Commission, the *amicus curiae* case is clearly a strategic use of the Equality Authority's resources.

The Equality Authority needs to be strategic about taking such applications and be fully competent of the delay that might be caused if the application might be opposed. I suppose to sum up and to conclude what is most striking about applying to be an *amicus* is the extent to which the state opposed the application. Even though I practised in the Bar for 15 years I have to say that all the parties involved were surprised at the extent of the opposition. I suppose what's also striking is that compared to the Equality Tribunal the degree I suppose of unfair familiarity with the equality legislation and that's only natural because the majority of cases are heard before the Equality Tribunal and the Labour court and so few cases have ended up before the Superior Courts. I suppose that is perhaps the best use of the *amicus*, to fill in the gaps in experience and knowledge, and to provide a separate perspective. And actually the need for the Amicus could become redundant if the Authority was successful in its applications and there would be the familiarity around the legislation. I'll just finish there. Thank you.