

PIL8

Structures for Public Interest Law

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I am delighted to be here with friends and colleagues. It is my first time in Ireland, which is astonishing given I have a particular affiliation with Ireland about which I shall speak at the FLAC conference next week. Save to say, the Irish people's passion for justice during an embattled history has informed my work as a public interest lawyer in South Africa and Australia. It also gives me a great thrill to be in Dublin. When I told them people in Sydney that I was coming to Dublin they were envious because Dublin is the hippest city in the world at the moment and while Sydney thinks it's the hippest city in the world, it's clearly coming second. And thank you so much to FLAC for the invitation.

When I joined the academy just under two years ago I developed a course called Public Interest Litigation - Origins and Strategies during which we travel (virtually) around the world exploring public interest litigation (PIL) in different jurisdictions, analysing the factors and features which serve and shape PIL in different countries, and looking at the mechanisms used to facilitate PIL.

While compiling the reading material for the course I came across the FLAC conference papers from a year ago and the papers of Michael Farrell and Mel Cousins – about whose important work students at UNSW Law Faculty now read thanks to FLAC. And a few months later, I received FLAC's invitation to be here today – so there's a great synergy to my being here. I am also delighted to be here because last night, Noeline Blackwell took me to Fagan's for my first Guinness. I'm feeling tough and ready for anything this morning as I managed to get through three-quarters of half a pint, which I believe is excellent.

Thank you also to Maura and Joshua for your presentations which were fascinating. And to endorse what Peter said earlier – how important and enriching it is to learn from different experiences and different jurisdictions. But what I'm always fascinated about is the commonality of experience, particularly when I listened to Maura's presentation. The organisation of which I was director in Sydney for 13 years, the Public Interest Advocacy Centre, has many similarities to FLAC and to Maura's centre [Law Centre Northern Ireland]. The resonances of similarity always give me comfort as regrettably, do the similarities of burdens and challenges.

I start – as is the way of my profession – with a disclaimer: I am not going to so much talk about South Africa because I left in 1989, when apartheid was about to end. My talk next week will focus more on that experience. My talk today will draw on my experience of public interest structures in South Africa only in so far as they've informed my experience of working in PIL in Australia.

I worked in a law firm in Cape Town for eight years before I left for Australia, doing work for anti-apartheid activists and trade unions. One of the greatest opportunities I had was to work for a commercial law firm which had a very unusual structure and ethos. And quite a few **law firms** in South Africa adopted this **model** during the years of apartheid, largely because some key lawyers (primarily white) felt that to work in law firms under apartheid demanded a commitment to undertake public interest and human rights work – we simply could not be complicit in a system which denied the majority of citizens rights and redress due to the colour of their skin. The unusual and unique model adopted by these firms saw commercial work fund or sustain the firm's public interest work, the latter being increasingly supplemented by funding from overseas (defence and aid) organisations. And through some pretty bold and innovative partners in my law firm, we managed, as the younger lawyers, to set up the public interest or human rights wing of the firm, working mostly with trade unions, church groups, students, journalists and victims of apartheid laws.

Alongside these firms, was the Legal Resources Centre (LRC), another model which facilitated PIL. A national organisation – one of its Directors, Geoff Budlender, spoke at the FLAC conference in 2005 – the LRC was set up with funds, initially external, to specifically address the needs of the majority of black South Africans who face extraordinary disadvantage in relation to housing, health, employment. Lawyers within LRC centres (like Odette Geldenhuys – who will address the FLAC conference next week) worked closely with black communities across urban and rural South Africa often developing cases sourced within individual hardship and poverty but which grew to set important precedents for entire communities and challenged laws which were cruel and discriminatory in impact. Allied to their work was the indispensable and formidable work of NGOs who shaped PIL, giving us access to the needs of communities and helping us conceptualise, frame and substantiate PIL.

In 1994, the Environmental Defenders Office in Sydney, a community legal centre focusing on environmental PIL, and the Consumer Law Centre, which undertook consumer credit issues, wrote a submission to our then Commonwealth Attorney General and Minister for Justice in support of the establishment of a national public interest legal assistance scheme. The advantages they cited in support of a government-sponsored PIL scheme were interestingly not confined to addressing the needs of marginalised and disadvantaged individuals and communities. Rather – and this approach certainly informed our strategies at the Public Interest Advocacy Centre – they addressed the value that PIL can offer government as a potential sponsor of programmes dedicated to deliver justice.

The advantages they cited in support of establishing a national legal assistance scheme to support PIL, included:

- the development and clarification of the law, with resultant increased equity, access to the law and public confidence in its administration;

- securing economies of scale: PIL can achieve outcomes which affect a wider circle of people experiencing common difficulties with reduced cost implications for legal aid commissions and the justice system as a whole;
- an impetus for reform and structural change: PIL leads to improved regulatory structures (through legislation, codes of practice, complaints mechanisms, industry ombudsman schemes) and changes in policy and practice by government or private corporations in fields such as banking, insurance, healthcare, chemical manufacture, utilities. The resultant reduced likelihood of disputes and need for litigation can, in large part, be attributed to successful PIL;
- market regulation and public sector accountability: private enforcement of public duties and actions in respect of unfair practices or defective and harmful products provide incentives to produce quality products and clean environments or safe and non-discriminatory work practices;
- a reduction of other social costs: successful resolution of civil and administrative disputes through PIL can prevent and halt costly market or government failures. For a small investment, PIL can save the community substantial direct and indirect costs (relating to forfeited taxes, health expenditure, and inefficient administration);
- public participation in decision-making: PIL can secure public participation in key decision-making processes and in judicial law making. Where those potentially affected by decisions or laws have an opportunity to shape their content and form, the potential exists for greater adherence to the outcome of PIL.

Unfortunately, the establishment of the national public interest legal assistance scheme had a very short life; it was dismantled two years after its commencement when the Howard government took power. However, structures supporting the conduct of PIL have interestingly continued to expand for a number of reasons.

Firstly, due to the benefits outlined in the submission. Secondly, because of a growing receptivity to PIL procedures from our courts, such as *amicus curiae* interventions. This is particularly the case as litigation has become more complex and unwieldy and as technology has increased accessibility to and the ambit of information. Judges are increasingly welcoming the help they receive via *amicus curiae* given the extent of information and issues they have to be across. Thirdly, the failure of the executive and the legislature to effectively address the needs of the community with a consequent and perhaps inadvertent reliance on the courts as an arm of government. Finally, PIL has become a vehicle, driven largely by clients, whereby the legal profession can attempt to correct perceptions, often accurate, of accumulation of income at the expense of serving the community.

With those background comments, I now turn to discuss some of the structures which exist in Australia to facilitate PIL under four categories:

(a) institutional structures, (b) resources, (c) procedural mechanisms and (d) educational initiatives.

(a) Institutional structures

In the 1970s, a progressive Australian government set up **community legal centres** (CLCs) to service community needs. Some centres had a specialisation, with a focus, for example, on consumer credit, disabilities, women, children. My organisation, the Public Interest Advocacy Centre, had a generalist focus. Community legal centres were also established in particular geographic areas to address the needs of communities, often ethnic communities, which had gathered in particular areas. Thus, CLCs had specificity in relation to the content of their work, and in regard to the communities they served.

The Public Interest Advocacy Centre was established in 1982. An independent, non-profit legal and policy centre, PIAC's brief was to address systemic issues which affected broad groups or classes of people. PIAC began with a staff of 3 and today, has a staff of 30 – lawyers, policy officers, trainers and administrators. Its key activities are public interest litigation, policy work and an education programme, called 'Work the System' which trains people and communities to navigate the law without having to rely on lawyers, where possible. PIAC's work seeks to expose unjust or unsafe practices, deficient laws and policies; obtain redress for those who would otherwise remain under- or unrepresented; promote good governance through improved access to information, public participation in decision-making and accountability of the public-private and community sectors; facilitate and influence public debate on public interest matters; foster development of case and statutory law that better reflects the public interest; enhance the capacity of community organisations to pursue the interests of the communities they represent; and maintain a national profile and impact.

In addition, PIAC's litigation, policy work and education and training, must address certain criteria, namely

- the issue must be consistent with PIAC's strategic plan, a three-year plan developed in consultation with relevant stakeholders and communities;
- the issue must have the potential to make a significant impact in the short to medium term;
- the work must not duplicate the efforts of others; a collaborative enterprise with other groups is encouraged if this might achieve a more effective or efficient outcome;
- the matter must offer opportunities for integrating litigation, policy, communication and education strategies.

This final issue echoes the point made by Maura (McCallion, Law Centre NI) about effective implementation. While we might have won a case in court, we need to ask whether it has been effectively implemented through government

policy or programs, and whether the community has been educated about and derived some benefit from the outcome of the case.

PIAC is funded by a mixture of sources. Largely, funding comes from the New South Wales Public Purpose Fund, created from interest earned on solicitor's trust accounts which is accumulated in a trust fund administered by the state Attorney General's Department for the benefit of the broader community.

The second institutional structure to facilitate PIL, is the NSW **Legal Aid Commission** which funds much of the litigation undertaken by PIAC, provided

- the case has reasonable prospects of success (merits test)
- the client is of insufficient means
- the issue raised by the client/case comes within the designated areas determined by the Commission e.g. family law, crime, mental health, discrimination, prisoner's rights, public interest environmental matters or children.

The Legal Aid Commissions are state bodies, funded largely via a federal funding arrangement. Under the current Howard government, state Commissions have faced extensive funding cuts and as they are more reliant on state funding, they have begun to set their own state agendas for aided work, in some instances with an increased focus on public interest/human rights litigation. For example, the New South Wales Legal Aid Commission, recently introduced a new category for legal aid ie Public Interest Human Rights matters.

The third institutional mechanism is the **Public Interest Law Clearing House (PILCH)**, set up in 1992. I had come to PIAC from private practice in Sydney, working in a major commercial law firm. During my time with this firm, I was interested to discover very little organised or structured pro bono work (similar to the private law firm model I had experienced in apartheid South Africa) undertaken by the private profession, which could afford to make a far greater contribution. After joining PIAC, I returned to my old firm to invite them to build a pro bono public interest partnership with PIAC and private law firms (PIAC adapted the model from a similar one in New York – New York Lawyers for the Public Interest), The Public Interest Law Clearing House (PILCH) was the structure which developed with PIAC filtering and referring public interest cases to member law firms on a pro bono basis. In joining PILCH, law firms commit to take on matters – assessed for compliance with public interest and pro bono criteria - for free and also pay PIAC a membership fee allowing PIAC, via PILCH, to conduct an effective assessment and referral service. Today, PILCHes exist in Sydney, Brisbane and Melbourne. In addition, the PILCH model has spawned other structures with law firm membership and support, such as the Homeless Persons Legal Clinic (funded by government and the legal profession) and the Human Rights Legal Resource Centre, which has a focus on domestic application of International human rights norms and standards.

PILCH members include barristers and firms of solicitors and law schools. The law schools provide research for some of the cases and law firms also host public interest seminars and events. Law firms pay annual membership fees (which are tax deductible) of about AUS\$250 per partner per year and barristers pay per chamber or floor. Members are invited to sit on the PILCH boards of management to govern the organisations and set policy. PILCH has been in existence for ten years and it has been a huge success story for the lawyers as well as the community. These structures have seen a real shift from the traditional law firm charitable model to structures which provide private lawyers with the opportunity to undertake challenging public interest work, using their legal skills and expertise to contribute to significant public interest and human rights cases and engage with and contribute to community. The PILCH model has been exported – we would be happy to design the Irish version! A few years ago, at the invitation of the Legal Resources Centre and Atlantic Philanthropies, I worked on a project in South Africa to evaluate whether a PILCH model might be viable to encourage private profession public interest legal work in post-apartheid South Africa. Odette [Geldenhuys] will speak more about the South African PILCH next week.

(b) The second category of structure which facilitates public interest litigation is perhaps the most crucial – that of **resources**. Obviously, PILCH is an important mechanism through which PIL can be conducted, accessing extraordinary resources in private law firms, such as technology, libraries and legal skill, expertise and time. Paradoxically, the current Australian government has attempted to hold up PILCH as justification for government reduction in legal aid funding. They have tried to run the line that given the contribution by the private profession to *pro bono* initiatives, the need for government (Federal) funding of (state) legal aid is declining. We make it very clear to Government, as does the legal profession, that the *pro bono* model is not a substitute for legal aid; rather *pro bono* supplements legal aid. Legal aid addresses the rights of citizens to access the legal system, whereas *pro bono* work goes to professional responsibility – it is the profession meeting its professional obligations.

A further resource mechanism available only in New South Wales via the Legal Aid Commission, is the indemnity provision under Section 47 of the Legal Aid Commission Act. Section 47 provides that if legal aid is granted to a client, and the client loses the case and costs are awarded against them, the legally aided client shall not be liable for any costs and the Legal Aid Commission will only pay up to a maximum of \$15,000 of the costs incurred by the successful litigant. The indemnity provision can present a disincentive to pursue litigation against a public interest litigant who is legally aided; alternatively, it may serve as an incentive to settle rather than embark on protracted and costly litigation when a successful outcome will only mean recovering costs up to a maximum of \$15,000.

An additional PIL resource mechanism of potential assistance to the public interest litigant, arises from a case called *Oshlack v Richmond River Council*

(1997) 152 ALR 83, where the court considered whether costs should be awarded against an unsuccessful litigant who had brought a case in the interests of protecting endangered flora/fauna from a development. The High Court held that where the litigant did not have any personal or pecuniary interest in the outcome of the litigation, he/she was to be considered a true “public interest litigant” and accordingly, the usual costs rule should not apply and the litigant should be excused from a costs order.

The last point I want to make in relation to resource mechanisms facilitating PIL, is that we now have in the Federal Court only, a provision for the award of pre-emptive cost orders (Federal Court Rule Order 62) – I understand they are called protective costs orders in the UK – where prior to commencing litigation, the litigant seeks to clarify and limit the costs of the case. Under this Order, the Court may, by order made at a directions hearing, specify the maximum costs that may be recovered on a party and party basis.

(c) I will refer briefly to the third area, which considers some of the **procedural mechanisms** which facilitate PIL. In looking at these, I do so bearing in mind the features of the content of PIL: that the issue raises a matter of public concern, affecting a class or section of the community, and addresses a systemic issue.

The form of PIL is very much dictated by the need to conserve costs, to maximize resources and to secure short-term impact with long-term effect. It is clearly counter the public interest to run cases for years, exhausting limited resources, and risk losing public support or momentum around the issue.

I mention some procedural mechanisms which serve the public interest objectives (both in terms of content and form) cited above:

- the test case, which establishes a precedent for broad application without the need to run serial cases
- the class action or representative proceedings which maximize resources and conserve costs and also have the capacity to affect a broad class of people, if they fit the criteria of the class;
- amicus curiae interventions. Australia courts are more amenable to hear from *amici* where they present a novel or an authentic perspective that neither of the parties will present; limit legal argument to written submissions and only address them orally very briefly; avoid protracting proceedings which are legitimately between two parties, to their detriment; What is often compelling about an *amicus* intervention, from a PIL perspective, is that you can introduce policy considerations, relevant social phenomena and international research findings and demonstrate the ‘ripple effect’ or impact of the final court determination beyond the parties to the dispute;
- open standing provisions. In the environmental jurisdiction, similar to the scenario referred to by Joshua [Castellino, Irish Human Rights Centre] in the Indian context, anyone concerned about a development which may

- threaten flora or fauna or reduce/divert community access to water, for example, may initiate proceedings without demonstrating a personal or pecuniary interest in the outcome of the matter;
- Australia currently has 2 state Bills of Rights, in the Australian Capital Territory and recently, in Victoria. It is still too early to assess the impact of these bills on PIL. However, in the absence of a Federal Bill of Rights, we have had to imply limited rights under a fairly archaic constitution. Political expression is one area where public interest lawyers have successfully implied a freedom of expression provision (see the cases of *Levy* and *Lange*);
 - Freedom of information legislation has been an important mechanism by which public Interest lawyers have successfully secured access to information in order to evaluate the merits of potential litigation and prepare or conceptualize legal proceedings. Information gained under FOI has often meant that expensive and protracted litigation can be circumvented when information is particularly damaging and a settlement is preferable to the opposing party;
 - Finally, more and more as our domestic system is failing us, we are moving to the international arena and using international mechanisms e.g. the First Optional Protocol where domestic remedies have been exhausted or are not available. Increasingly, cases of public and national import relating for example, to prisoner's rights, the rights of refugees and detainees, indigenous people and of gay men, have yielded important determinations from the UN. Regrettably, these determinations have also been increasingly ignored by our own government in terms of domestic application. However, they have attracted international visibility and exposed the hypocrisy of our government as a recalcitrant signatory to international human rights conventions.

(d) Finally, I mention **educational initiatives** as a structure to facilitate PIL. Lawyers are clearly one of the best 'structures' for facilitating PIL and we need to make sure that the lawyers we are now admitting to practice are aware of this; and this awareness starts within law school where we can we expose students to the practice and challenges and rewards of public interest law. The course I mentioned earlier, 'Public Interest Litigation: Origins and Strategies', seeks to integrate the theory of human rights law with the practice of PIL, allowing students to leave law school with a taste (hopefully, acquired) to pursue some aspect of PIL during their professional lives.

At PIAC we developed a course called 'Practicing in the Public Interest', in partnership with six university law schools. We ran a week-long winter and a summer school offering students (who would get credit to do these courses) three days of intensive training on public interest mechanisms, campaigning, working with the media, undertaking policy work and law reform, followed by a two day clinical placement with a public interest organisation, such as Amnesty

International or the Red Cross or a trade union, where they would get on-the-ground experience.

My law school recently introduced a course called 'The Public Interest Law Internship Programme' where students, over a period of 14 weeks, are placed with organisations including the Legal Aid Commission, the Human Rights Commission, a community legal centre or with the Legal Affairs Editor of a leading newspaper. They work on site and at the conclusion of the 14 weeks, present a seminar on an aspect of their research or clinical experience.

In **conclusion**, perhaps what my presentation seeks to emphasise is that often, in utilising structures to advance a public interest, a very significant component is not necessarily winning a case but rather creating a first important benefit of PIL, that is exposure around issues – giving visibility to matters which too often remain hidden or out of focus and unarticulated. And that is where the media is a critically important public interest ally – when used judiciously.

Secondly, litigation is of little public value without the parallel campaign and policy work, which ensures the sustainability and reach of the legal outcome.

Thirdly, not every matter of public import lends itself to legal resolution and premature or inappropriate selection of cases and/or application of legal procedures, can prejudice the fragile advancement of a public interest and undermine the institutions and mechanisms called upon to seek its protection. The judicious selection of matters, procedures and fora for their articulation, is often critical to ensuring community, political and judicial support.

And finally, I return to South Africa and to a wonderful quote by Andre Brink, a South African author, in a book called *A Dry White Season*, which was made into a film with Marlon Brando and Donald Sutherland. Marlon Brando plays a lawyer who is representing a black woman whose husband is found hanging in a police cell under suspicious circumstances. He says to his client: 'I'll represent you in the inquest, but you need to know that law and justice are distant cousins and here in South Africa, they're not even on speaking terms.' And so it is with PIL and the structures we need to create and nurture to ensure it endures as a legal form. The effective conduct of PIL seeks to undermine that estrangement between law and justice, to build a confidence in the law to effect change, and to enliven democratic values.