

# Access to Justice:

a Right or a Privilege?

A Blueprint for Civil Legal Aid in Ireland

**Access to Justice: A Right or a Privilege?**  
A Blueprint for Civil Legal Aid in Ireland

**A FLAC REPORT**

*FLAC is an independent human rights organisation dedicated to the realisation of equal access to justice for all. It campaigns through advocacy, strategic litigation and authoritative analysis for the eradication of social and economic exclusion.*

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# Preface

At the opening of the first ever state-funded Law Centre in 1980, the Minister for Justice, Gerry Collins T.D., declared that the aim of the scheme was "to make the necessary legal services available to every deserving person in the country." When the scheme was then put on a statutory basis in 1995, the stated objective of the Civil Legal Aid Act was to "make provision for the grant by the State of legal aid and advice to persons of insufficient means in civil cases".

This FLAC report demonstrates that after 25 years of state legal aid, the scheme has failed to achieve its stated goals. Despite the ongoing commitment and dedication of staff and Board members, it neither provides the necessary service nor ensures that it is delivered to all those entitled to it.

Excluding a specialised service provided by the Refugee Legal Service, the Legal Aid Board employs a total of 89 solicitors to deliver the entire civil legal aid scheme in 30 Law Centres throughout Ireland. This is less than the number employed in some large legal firms in Dublin. Small wonder then that waiting lists for civil legal aid in many centres have been extremely lengthy, leaving people without any legal assistance for as long as two years in some locations. As the CEO of the Legal Aid Board explained in a letter to the Department of Equality and Law Reform on 30 April 1997, "[i]t is indeed a fact that the maintenance and management of extended waiting lists has become a block of work in its own right, which detracts from the ability of the staff to provide legal services." Ad hoc injections of money have from time to time reduced the backlog, only for it to build up again. Such a small group of lawyers, no matter how dedicated and able, could not and should not be burdened with the responsibility of delivering an effective legal aid service to an entire country. That responsibility belongs to the State and to the Board of the Legal Aid Board who fund and oversee the service.

These long delays occur even though the financial criteria that limit the service are extraordinarily restrictive. Following the introduction of a statutory scheme in 1995, a means test was laid down by regulation. Since then, it has been adjusted only once, in 2002. There is no mechanism at present to link it to increases in the cost of living. Except for separated spouses, whose incomes are individually assessed, the family of a legal aid applicant must have a 'disposable' family income of not more than €250 a week. Out of that, the average family has to pay its grocery, clothing and utility bills, its childcare costs over €21.15 per child and any accommodation or mortgage costs over €94.50 per week. Allowances which used to be made for other loan repayments, hire purchase and travel expenses were all abolished in 2002. To add insult to injury, even those who live with this level of financial strain may face large bills for services from the Legal Aid Board. Everyone who is granted legal aid must pay a contribution towards the service. While the minimum contributions of €6 and €35 are clearly stipulated, it is not made clear that some clients, depending on the value of their property as well as their income, and depending on whether cash is 'recovered' by a legally aided client, may end up paying the full cost of their legal service, charged at an hourly rate. In such cases, the legal aid service is of no financial value at all to a client.

There is also a worrying lack of diversity in the work done within the civil legal aid scheme. Some areas of law are entirely excluded and the Board has consistently prioritised family law over everything else. As a result, in 2003, the last year for which figures are available, the Legal Aid Board only provided legal aid in 81 civil cases which did not involve family law. By any standards, this is an extraordinarily low figure for cases countrywide. Many clients attending FLAC centres need legal representation in relation to social welfare, housing, employment, immigration, and debt and consumer law. These needs are not met in the current system. Contrary to its stated goal of providing a legal aid service to those who deserve it, it is designed and managed centrally to suit its creators and managers. Many who need and deserve a service do not get it, in clear breach of their civil and human rights.

This current overburdened, under-resourced and limited service is a direct and foreseeable consequence of the lack of state priority in promoting, or even protecting, the fundamental human right of access to justice. Most immediately, this shows in the total failure of the State to meet either of its explicit goals for its own legal aid scheme. Contrary to Minister Collins' intention, the necessary legal services are not available to every deserving person. In stark conflict with the purpose of the Civil Legal Aid Act 1995, civil legal aid and advice is not available to every person of insufficient means, given that many on very modest incomes fail to qualify. People have suffered and will continue to suffer harm. Wrongs are not rectified, or are rectified much later than they should be. Many are unaware that they are being wronged because they lack relevant information or advice.

There is an urgent need for change and reform. Civil legal aid must have proper, stable statutory funding. The Legal Aid Board must employ sufficient staff to provide civil legal aid and advice to those who need legal services to use the law, but who cannot afford it without aid. The income and contribution limits used in the current assessment of means are hopelessly outdated. The means test must be set at a level which allows people to get over the lack of money barrier which impedes them from accessing justice. Where contributions are payable, they should be realistic and a person's family home should not be used as the basis for calculating a contribution to legal aid. Instead of selecting certain areas of law that it chooses to cover, the State should immediately recognise its duty to provide legal aid based on the client's need.

These changes are needed urgently as minimum measures to repair a system which has fallen into serious disrepair through neglect. However, the State's responsibility to protect and to promote the right of access to justice is not met by remedial action alone. Its duty is to ensure access to justice for all its people. Communities which are marginalised or living in poverty are particularly likely to suffer serious injustices. The same groups are also likely to be excluded from the various routes by which other members and groups in society in general may seek remedies. State responsibility extends to ensuring that these groups are empowered to remedy these wrongs.

The current structure of civil legal aid is not inclusive. It does not place the needs of the client at the heart of its decision and policy-making. It does not engage with communities in relation to their priority needs, nor does it undertake public or community legal education.

The denial of the right of access to justice is the denial of a core and fundamental human right. It is the duty of the State, and agencies such as the Legal Aid Board which carry a statutory mandate, to ensure that the right is respected, protected and promoted. The existence of a civil legal aid scheme demonstrates that the State recognises it has a key role to play. However the restrictions, inadequacies and delays in the current scheme, together with the lack of any proper facility for addressing client or community need, show that only grudging steps have been taken to ensure to every person the right to equality before the law; a right guaranteed by Irish constitutional law and international human rights law. FLAC calls on the State and on the Legal Aid Board to make equal access to justice for all a reality.

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## Chapter 1

# The Right to Civil Legal Aid

### 1.1 Introduction

Ireland has had a state-funded civil legal aid scheme since 1979. Its current design is based on the provisions of the Civil Legal Aid Act 1995. That Act describes the purpose of the scheme as one to "make provision for the grant by the state of legal aid and advice to persons of insufficient means in civil cases."<sup>1</sup> In the debate prior to its enactment, Mervyn Taylor TD, Minister for Equality and Law Reform, stated the purpose of the legislation to be the provision by the Legal Aid Board of legal services in civil matters to persons of limited means, at little or no cost to applicants.<sup>2</sup>

Underpinning the legal aid scheme is the recognition of the fundamental human right of access to justice. The provision of legal aid is one of the ways in which that right can be given practical effect.

### 1.2 Background

In 1974, a Committee was established by the Minister for Justice to inquire into and make recommendations around state provision of legal aid and advice in civil matters. Chaired by Judge Denis Pringle, the terms of reference of the committee were:

- To advise on the introduction at an early date of a comprehensive scheme of legal aid and advice in civil matters and to recommend on the form, nature and administration of the Scheme and on the legislation necessary to establish it.
- To consider whether, pending the introduction of a fully comprehensive scheme, it would be desirable and possible to develop as a matter of urgency a system of legal advice centres and legal aid in certain categories of cases which the Committee considered merited immediate attention.
- To estimate the cost of the scheme or schemes proposed, and to advise on the manner in which such scheme or schemes could be financed, including the possibility of contribution from legally aided persons and from persons having a legal obligation to provide for or to compensate such persons.<sup>3</sup>

The Committee was not required to demonstrate the need for a comprehensive scheme of legal aid and advice, since, as the report says, "the then Minister for Justice, when he addressed us immediately before our first meeting, said that the need for such a scheme was already well recognised".<sup>4</sup> The Committee invited submissions from groups and individuals with an interest in the issue and also held oral hearings. Systems of legal aid in other jurisdictions were also examined.

The Committee reported in 1977 and recommended that legal aid should be made available to eligible persons in relation to all civil proceedings, including tribunals, inquests and arbitrations.

While these matters were being considered by the Pringle Committee, Josie Airey was seeking a judicial separation from her husband. At the time, such proceedings had to be taken in the High Court and she was unable to afford the high cost of legal representation there. Owing to the absence of state provision of civil legal aid, she wrote to the Commission of the European Court of

Human Rights at Strasbourg (ECtHR). She complained that Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) guaranteed her a right of access to the courts and that, given the prohibitive costs of obtaining a judicial separation and the lack of any state subsidy, this right had been infringed. The Court accepted her argument and found that it would be unreasonable to expect a person untrained in the law and procedures associated with judicial separation in Ireland to effectively present their own case.<sup>5</sup>

### 1.3 Statute

Following the report of the Pringle Committee and the decision in *Airey v. Ireland*, a Scheme of Civil Legal Aid and Advice was set up in Ireland in 1979. The scheme was provided through Law Centres on an administrative basis until it was put on a statutory footing in 1995.

The current statutory civil legal aid system was established under the Civil Legal Aid Act 1995 (the Act) "to make provision for the grant by the State of legal aid and advice to persons of insufficient means in civil cases".<sup>6</sup> The Act was supplemented by the Civil Legal Aid Regulations 1996, which came into operation on 11 October 1996.<sup>7</sup> The Act did not make any substantial alteration to the previous Civil Legal Aid Scheme and continued to focus on providing legal advice and, to some extent, representation in individual cases.<sup>8</sup>

The Act provides that the system of civil legal aid will operate through the Legal Aid Board, which shall, "subject to the provisions of this Act, be independent in the exercise of its functions".<sup>9</sup>

Section 5(1) provides that the principal function of the Board shall be:

[T]o 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.

The Board may perform its functions through any of its staff,<sup>10</sup> duly authorised, and shall disseminate information in relation to its services and their availability.<sup>11</sup> The Minister for Justice, Equality and Law Reform may, with the consent of the Minister for Finance, assign additional functions to the Board.<sup>12</sup>

Section 18 of the Act provides that:

[T]he Minister may, in each financial year, with the consent of the Minister for Finance, advance to the Board out of moneys provided by the Oireachtas, such sum or sums as the Minister, after consultation with the Board, may determine for the purposes of expenditure by the Board in the performance of its functions under this Act.

The Minister may, by order, issue to the Board such general directives as to policy in relation to legal aid and advice as he or she considers necessary, and the Board shall, in performing its functions, comply with any directive under this section.<sup>13</sup> Subject to the provisions of the Act, the Board may do anything which it considers necessary or expedient for enabling it to perform its functions under the Act.<sup>14</sup>

Section 19(1) of the Act states:

[T]he Board shall, subject to such conditions as may, with the consent of the Minister for Finance, be prescribed by the Minister, establish and maintain a fund to be known as the Legal Aid Fund.

This Fund consists of all resources of the Board, including sums advanced to it by the Minister for Justice, Equality and Law Reform, and all other payments made to the Fund or the Board, including contributions by persons who have been granted legal aid and advice and costs and damages recovered by such persons and paid into the Fund.<sup>15</sup>

The Act establishes the general criteria for granting civil legal aid and advice (generally called the 'merits test'):

Without prejudice to the other provisions of this Act a person shall not be granted legal aid or advice unless, in the opinion of the Board—

- (a) a reasonably prudent person, whose means were such that the cost of seeking such services at his or her own expense, while representing a financial obstacle to him or her would not be such as to impose undue hardship upon him or her, would be likely to seek such services in such circumstances at his or her own expense, and
- (b) a solicitor or barrister acting reasonably would be likely to advise him or her to obtain such services at his or her own expense.<sup>16</sup>

Further criteria for legal aid and advice, such as financial eligibility and areas of law excluded, are set out in the Act.<sup>17</sup> It also describes the system for the delivery of civil legal aid through Law Centres, or through barristers and solicitors whose names are on panels.<sup>18</sup> Finally, the Minister may make such regulations as are necessary for the purpose of giving effect to the Act, including prescribing the conditions under which legal aid and advice shall be available.<sup>19</sup>

Since the enactment of the Civil Legal Aid Act 1995, some limited provision for further legal aid has been made. The Irish Human Rights Commission may offer legal advice and assistance in cases raising human rights issues where the person concerned cannot obtain assistance from the Legal Aid Board.<sup>20</sup> The Commission also has power to institute proceedings itself in respect of any matter concerning the human rights of a person or class of persons<sup>21</sup> and appear as *amicus curiae* in cases taken by other parties which raise human rights issues.<sup>22</sup> In addition, the Equality Authority, at its discretion, where the case has strategic importance or may set a precedent, may provide free legal assistance to those making complaints of discrimination under the Employment Equality Act 1998 and the Equal Status Act 2000.<sup>23</sup> This assistance is available only in a small number of cases. Therefore, in the main, civil legal aid in Ireland is administered under the scheme set up by the Civil Legal Aid Act 1995.

#### 1.4 Constitutional issues

There is no express right to effective access to justice in the Irish Constitution. The Constitution Review Group has examined whether there should be a separate specific right of access to the courts.<sup>24</sup> It concluded that, while a right of access to the courts was already protected as an implied personal right under Article 40.3.1, this right should be expressly stated in the Constitution. A majority of the Group also considered that while the right should not remain purely theoretical, there was no need to go further and specify in the Constitution how the Oireachtas might give it practical effect.

The constitutional right to civil legal aid has also been considered by the courts in a line of authorities, culminating in the decision of *O'Donoghue v. Legal Aid Board, The Minister for Justice Equality & Law Reform, Ireland and the Attorney General*,<sup>25</sup> where the High Court found that the plaintiff's constitutional right to civil legal aid had been infringed by the very long delay in granting her a certificate for legal aid.<sup>26</sup>

In the 1971 case of *O'Shaughnessy v. Attorney General*,<sup>27</sup> O'Keefe P took the view that the job of vindicating personal rights was that of the legislature, rather than the courts. He therefore rejected the argument that the provisions of the Criminal Justice (Legal Aid) Act 1962 were unconstitutional because they failed to provide for civil legal aid.

*M.C. v. Legal Aid Board*<sup>28</sup> concerned a claimed right to legal aid in nullity proceedings before the High Court. Gannon J held that the State did not owe any personal duty to the applicant just because she was party to civil litigation in a forum provided by the State. Further, the State was not

bound to intervene by providing legal aid simply because the nullity proceedings in question concerned her personal right to the constitutionally recognised status of marriage. Even though a non-statutory civil legal aid scheme existed at the time, there was no obligation on the State to aid any particular litigant. An individual citizen did not have a constitutional right to require the State to provide financial support for civil litigation in a dispute with another citizen.

However, he found that there was an obligation on the State to ensure that the Scheme was administered fairly and that it fulfilled its purpose.

I am not convinced that there is any provision in the Constitution which imposes a duty of the State to provide any form of support for civil litigation amongst citizens. In the absence of such duty I can find no express or implied right in any citizen to require the State to provide financial support for, or to afford free facilities, for civil litigation of a dispute with another citizen.<sup>29</sup>

Refusing to recognise a right to civil legal aid for a person appearing before an administrative tribunal, Murphy J said in *Corcoran v. Minister for Social Welfare*:<sup>30</sup>

No precedent or authority has been produced for the general proposition that a lay tribunal exercising a quasi-judicial function must afford to the parties appearing before it an opportunity to procure legal advice and to be represented by lawyers.

While the court did not make a judgment on whether the State could be compelled to provide civil legal aid to those unable to afford a private solicitor, O'Hanlon J commented in *Mac Gairbhith v Attorney General* that:

"the frightening cost of litigation ...[is] a major deterrent to people who wish to have access to the Courts established under the Constitution and may in many cases actually prevent parties from availing of rights nominally guaranteed to them by the Constitution."<sup>31</sup>

However, in *Stevenson v. Landy & others*,<sup>32</sup> Lardner J held that there was a constitutional obligation on the Legal Aid Board to make legal aid available to a mother who had a "worthwhile contribution" to make in wardship proceedings. He also considered the constitutional position in *Kirwan v. Minister for Justice, Ireland and the Attorney General*.<sup>33</sup> In that case, involving review of the detention of a person in the Central Mental Hospital, the court held that the constitutional requirement for fair procedures included, in this instance, an obligation to provide civil legal aid to any applicant who was "without the requisite means to procure the collection of the relevant information and to formulate and present the appropriate information." Lardner J concluded that if the existing Legal Aid Scheme did not extend to an application such as this, then the State had a constitutional obligation to make arrangements to provide such legal aid as was necessary to enable the application to be effectively made.

In the case of *Byrne v Scally & Others*,<sup>34</sup> the High Court showed a reluctance to expand on the development of the right to civil legal aid. Ms Byrne, without legal representation, had to answer Dublin Corporation's application for an eviction order under Section 62(3) of the Housing Act 1966. Such applications relate to alleged anti-social behaviour by a Council tenant. Despite the serious implications of the proceedings for the tenant, O'Caoimh J did not agree that the case was complex. He believed that the procedures to be followed were straightforward in themselves. He distinguished this case from *Stevenson v. Landy*, stating:

I am of the view having regard to the restricted jurisdiction of the District Court in an application under section 62 of the Housing Act 1966, that the procedures involved are straightforward and relatively simple and involve certain straightforward proofs to be satisfied. Were the circumstances otherwise and were the District Court entitled in the exercise of its jurisdiction to enquire into the reasons for the service for the Notice to Quit then undoubtedly a different situation would pertain and a situation akin to that pertaining in the case *Stevenson v. Landy* would apply whereby the requirements of constitutional justice would ordain that legal aid be granted.<sup>35</sup>

In the recent High Court case of *O'Donoghue v. The Legal Aid Board & Others*,<sup>36</sup> Kelly J addressed the current position in relation to the constitutional right to legal aid in Ireland. The plaintiff had sought civil legal aid for a family law issue in February 1997 and was told to expect a response within six weeks. However, she did not see a solicitor until February 1999 and on 25 March 1999, she was granted legal aid. It was clear to the judge that Ms O'Donoghue was, at all material times, entitled to legal aid but that she had to wait for more than two years before she obtained it.

Ms O'Donoghue sued both the Legal Aid Board and the State. She argued that the delay in obtaining legal aid and advice was unreasonable and in breach of her rights, including unenumerated rights<sup>37</sup> under Articles 40.1 and 40.3 of the Constitution, which, she argued, recognised a right of access to the courts and a right to timely legal representation to vindicate that right of access.

During the case, the Director of Legal Services with the Legal Aid Board told the court that lack of management resources had hampered the granting of legal aid certificates. There were huge pressures on staff and insufficient resources available to deal with the demand, even though the Minister had been requested to provide extra resources. Kelly J accepted the arguments made by the Board. He agreed that the statutory obligation imposed on the Board by the Act was not an absolute one and that it was required to carry out its functions within its resources.

He held that the delay in providing legal aid to Ms O'Donoghue was caused exclusively by the lack of resources made available to the Board and that the Board itself was, therefore, not in breach of its statutory duty. The judge summarised the arguments of the State as follows:

[Counsel for the State] contended that there was no statutory, constitutional or European Convention right to legal aid. Consequently there can be no right to have her application dealt with expeditiously. On the question of delay, the only concession he made was that the plaintiff had experienced delay but denied that it was unreasonable. He contended that legal aid was nothing more than a provision in law which the State made but did not confer a right to it. He also submitted that even if there was a right, be it statutory, constitutional or under the European Convention for Human Rights, the court was entirely powerless to give effect to it because to do so would have fiscal implications for the State. Any decision in favour of the plaintiff would contravene the separation of powers. An intervention by the court is off limits it is argued.<sup>38</sup>

Kelly J rejected these arguments. In finding that the plaintiff had rights which had not been vindicated, he reviewed the case law and said:

[I]t seems to me that the unfortunate circumstances of the plaintiff in the present case are such that access to the courts and fair procedures under the Constitution would require that she be provided with legal aid. That view is reinforced by the fact that she fell squarely within the entitlements to such under the Act and the regulations but was denied it for a period of 25 months because of the manifest failure of the State. The delay in granting the certificate for legal aid, in my view, amounted to a breach of the constitutional entitlements of the plaintiff and if she can demonstrate loss as a result she is entitled to recover damages in respect thereof.

It is not enough to set up a scheme for the provision of legal aid to necessitous persons and then to render it effectively meaningless for a long period of time. The State must per Gannon J (in *M.C. v. Legal Aid Board*) ensure that the scheme "is implemented fairly to all persons and in a manner which fulfils its declared purposes."<sup>39</sup>

Kelly J found that the Civil Legal Aid Act 1995 gives substance, in many ways, to the constitutional entitlement to legal aid for those who qualify. He acknowledged that the legislature was entitled to define reasonable limits to that right. But the right could not be effectively set at nought for years, as he had found it to be in this case.

In relation to the State's argument that a judgment in favour of the plaintiff would contravene the principle of the separation of powers, the judge held that the case was not concerned with a claim for mandatory relief against the State and that the court was doing no more than what the courts had been doing since at least *Ryan v. Attorney General*,<sup>40</sup> namely, ensuring that a right under the Constitution was protected and given effect.<sup>41</sup>

Finally, on the issue of what might be an acceptable delay in providing legal aid, the judge felt that the Legal Aid Board's own target of two to four months was reasonable and that the plaintiff ought to have had a consultation with a solicitor within that period. He awarded her damages based on the loss she had suffered as a result of the excessive delay.

## 1.5 European Convention on Human Rights and Fundamental Freedoms

### 1.5.1 The European Convention and its case law

The European Convention on Human Rights and Fundamental Freedoms (ECHR)<sup>42</sup> and the case law of the European Court of Human Rights (ECtHR) have given important guidance on the right of access to the courts and, in some cases, the right to legal aid. One of the most important cases on this topic is the already cited case of *Airey v. Ireland*.<sup>43</sup>

Article 6(1) of the ECHR contains the provision that

[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Ms Airey had argued that the prohibitive cost of applying to the High Court for a judicial separation had infringed her right of access to the courts. On an examination of Article 6(1), the ECtHR dismissed the State's central argument that Ms Airey enjoyed access to the High Court, just because she had a constitutional right to appear in person in the High Court to plead her own case, without the assistance of a lawyer. It held that "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective."<sup>44</sup>

The ECtHR concluded that it would be unreasonable to expect a person who is untrained in the law and procedures associated with judicial separation in Ireland to effectively present their own case. The Court held that the case involved complex procedures before the High Court, complicated points of law and an emotional involvement incompatible with the objectivity required by advocacy in court. It therefore concluded that, while in theory Ms Airey could represent herself, in practice she was denied the guarantee of access to court and a fair hearing as contained in Article 6(1). The ECtHR stated that Article 6(1) may sometimes compel the State to provide for the assistance of lawyers, when such assistance proves indispensable for an effective access to court, by reason of the complexity of the procedure or the case. In the later case of *Fransson v. Sweden*,<sup>45</sup> the Court reiterated that the test is a strict one. There is no state obligation under the ECHR to make legal aid available, unless it is indispensable to vindicate a person's right of access to justice.

In other recent cases, the ECtHR has elaborated the tests which may be applied to establish whether Article 6(1) rights are being respected within a state's legal aid system. In *Bertuzzi v. France*,<sup>46</sup> the ECtHR found that the French authorities had violated the applicant's rights under Article 6(1) of the Convention. The applicant had sought to sue a lawyer and had been granted legal aid for that purpose. However, three lawyers allocated to the applicant had withdrawn because of their personal links with the proposed defendant. The Court found that the authorities should have taken steps to ensure the appointment of an alternative lawyer who would act for the applicant. Thus once the entitlement to legal aid is given, states must take steps to ensure that it is effective, provided that it is necessary to ensure access to the courts.

The absence of legal aid to allow four Georgian nationals to bring proceedings from the Gibraltar Courts to the Privy Council of the United Kingdom formed the subject of complaint in *Duyonov v. UK*.<sup>47</sup> The applicants claimed that the failure to provide legal aid in this case breached their rights under Article 6 and Article 13<sup>48</sup> of the ECHR. The case was settled before hearing under the Court's procedures for friendly settlements. The applicants received compensation and the legislation in Gibraltar was subsequently amended.

Legal aid or assistance may be subject to conditions without violating Article 6(1) of the Convention. In *X. v. UK*, the Commission of the European Court of Human Rights stated that it was reasonable for a civil legal aid scheme to impose conditions involving, *inter alia*, the financial situation of the litigant or the prospects of success of the proceedings. The Commission stated:

It is self evident that where a state chooses a 'legal aid' system to provide for access to court, such a system can only operate effectively, given the limited resources available, by establishing machinery to select which cases should be legally aided. Such limitations on the availability of free legal aid, common to most Convention countries, often require a financial contribution or that the proposed litigation have justified prospects of success. In the Commission's view Article 6(1) does not require that legal aid be provided in every case, irrespective of the nature of the claim and supporting evidence.<sup>49</sup>

However, an important ruling in 1998 clarified state obligations on the assessment of eligibility for legal aid. In *Aerts v. Belgium*,<sup>50</sup> the applicant complained of an infringement of his right of access to the Belgian appeal court because of the refusal by the legal aid authority in Belgium to grant him legal aid for an appeal. The application had been refused on the grounds that the appeal did not at that time appear to be well-founded and that there was no absolute entitlement to legal aid under the Convention. The ECtHR held that an analysis of the merits of a legal aid application should not become a kind of "prejudgment" of the case, i.e., that the authority responsible for examining the legal aid application should not examine the prospects for the success of the action. The Court held that there had been a breach of Article 6(1) after noting that:

[b]y refusing the application [for legal aid] on the ground that the appeal did not at that time appear to be well-founded, the Legal Aid Board impaired the very essence of Mr Aerts's right to a tribunal.<sup>51</sup>

In *Del Sol v. France*,<sup>52</sup> however, the ECtHR found that legal aid schemes may legitimately assess the merits of the case and the financial status of the applicant to decide whether legal aid is warranted. They may do this through administrative tribunals rather than courts if they so decide. The Court distinguished this case from *Aerts* in that it considered it important to have due regard to the quality of a legal aid scheme within a state. In this instance, the scheme set up by the French legislature offered individuals substantial guarantees "to protect them from arbitrariness".<sup>53</sup> By implication, these guarantees did not exist in the *Aerts* case.

Two contrasting cases, both involving defamation proceedings, show that the core human rights issue for the ECtHR is whether the absence of legal aid hinders the right of access to a fair hearing guaranteed by Article 6(1) of the ECHR. In *McVicar v. The United Kingdom*,<sup>54</sup> the ECtHR considered that the applicant, a "well-educated and experienced journalist who would have been capable of formulating cogent argument," was not prevented from presenting an effective defence by his ineligibility for legal aid.<sup>55</sup> However in the case of *Steel & Morris v The United Kingdom*<sup>56</sup> (often called the *McLibel* case), the court found that the refusal of legal aid to the applicants had denied them the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with the fast-food chain, McDonalds. There had, therefore, been a violation of Article 6(1) of the ECHR.

In May 2005 the Minister of Justice, Equality and Law Reform asked his Department and the Attorney General to conduct a preliminary examination of the *McLibel* judgment's implications for

Ireland<sup>57</sup> as the current Irish scheme of legal aid, like its former counterpart in the UK, excludes representation in cases of defamation.<sup>58</sup> Given the conclusion of the ECtHR in *Steel & Morris*, it is quite clear that the blanket exclusion of defamation or of any other category of law from civil legal aid in Section 28(9) of the Act cannot be compatible with the right to a fair hearing guaranteed by the provisions of the ECHR and the judgments of the European Court of Human Rights and Section 28(9)(a) of the Civil Legal Act 1995 will have to be repealed.

The Commission of the ECtHR has also ruled that legal aid is not required in all cases. Where proceedings are straightforward and no complex issues of law arise, legal aid may not be necessary to ensure a fair hearing of the case. In *Webb v. The United Kingdom*,<sup>59</sup> which involved affiliation proceedings, the Commission considered the criteria established in the *Airey* case, but found that there was a significant difference between the complexity of the proceedings in the case in question and those in *Airey*. It found:

In the notion of a fair hearing Article 6(1) of the Convention does not guarantee that both parties to any proceedings must necessarily be represented by counsel or granted legal aid to that effect. No such rigid principle is contained in, or implied by, this provision which does, however, require that the proceedings taken as a whole must be fair. As a result, the task of the judge or judges in proceedings to which Article 6(1) applies is never passive, but includes the ultimate responsibility for ensuring fairness of the proceedings whether or not the parties are represented, and this safeguarding principle is especially relevant in contested proceedings where one of the parties appears in person.

In the case of *Doran v. Ireland*,<sup>60</sup> dealing with a claim in relation to a long delay in court proceedings, the ECtHR pointed out that Article 13 of the Convention guarantees the availability of a remedy at national level to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order.<sup>61</sup> The remedy must be effective both in law and practice; just because there is a constitutional right of access to justice and the courts does not mean that there is an effective remedy for the prevention of excessively long proceedings or delay.<sup>62</sup>

The ECtHR itself grants legal aid to applicants in cases before it, subject to a means test. It makes no distinction between cases arising out of civil or criminal proceedings in deciding whether to grant legal aid.

### 1.5.2 European Convention on Human Rights Act 2003

The European Convention on Human Rights was incorporated into Irish law by the European Convention on Human Rights Act 2003 (ECHR Act). According to Kilkelly,

[t]he process of incorporating the Convention has clear potential to enrich the human rights jurisprudence of any national legal system that embraces it. In Ireland, in particular, with its wealth of constitutional jurisprudence on human rights, giving effect to the Convention in national law can only add to the protection and promotion of human rights values.<sup>63</sup>

Section 3 of the ECHR Act states:

- (1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.
- (2) A person who has suffered injury, loss or damage as a result of a contravention of *subsection (1)*, may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to *subsection (3)*, in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate.

The ECHR Act has introduced a new framework for the exercise of public obligations, requiring that its provisions be integrated into public services. Organs of State are obliged to give effect, as far as is legally possible to the provisions of the Convention. The requirements of procedural

fairness which flow from Article 6 of the Convention are a particular concern for the Legal Aid Board and for those government departments responsible for funding legal aid. All of these are organs of State under the Act and therefore must ensure fairness in the design of procedures to ensure compatibility with the Convention, hearing both sides within a reasonable time, facilitating equality of arms, making reasoned decisions, publishing these decisions and guaranteeing the right to free interpretation.

The potential for damages for breach of these obligations in relation to the ECHR, particularly Articles 6, 8 and 13 has not yet been explored. However, both the blanket exclusion of many areas of law from the scope of the civil legal aid scheme and the narrow eligibility criteria exclude many applicants from civil legal aid and by extension access to the courts and run directly counter to ECHR obligations and the judgments of the ECtHR.

In addition to existing remedies,<sup>64</sup> Section 3(2) of the ECHR Act provides for a new tort where no other tortious remedy exists.<sup>65</sup> In addition, the long title to the Act states that it is enacted to enable "further effect" to be given to certain provisions of the Convention and certain of its Protocols, subject to the Constitution.<sup>66</sup> "Further effect" should mean affording effective and appropriate relief under Section 3(1), where an organ of the State offends that provision.<sup>67</sup>

## 1.6 Other International Instruments relating to Civil Legal Aid

### 1.6.1 Council of Europe

The Council of Europe, comprising 46 of Europe's states, and the organisation which established the European Convention on Human Rights, has also addressed the right to legal aid and access to justice directly in a number of resolutions and agreements.<sup>68</sup> Many of these instruments are directive rather than legally binding, but they demonstrate a political will and consensus of which Ireland is a part and which it has agreed to respect. A 1978 *Resolution on Legal Aid and Advice*<sup>69</sup> reminds Member States that

[t]he provision for legal aid should no longer be regarded as a charity to indigent persons but as an obligation of the community as a whole.

A Recommendation<sup>70</sup> in 1993 from the Council of Ministers to its Member States carried suggestions on how states could facilitate access to the law, to quasi-judicial methods of conflict resolution and to the courts for those on very low incomes.

In addition, the 1977 *European Agreement on the Transmission of Applications for Legal Aid*<sup>71</sup> regulates the transmission of applications for legal aid between European countries. While the agreement does not create a new right to legal aid, it seeks to remove existing obstacles to bringing civil proceedings abroad. Article 2 requires each Contracting Party (member state) to designate a central receiving authority to receive and take action on applications for legal aid coming from another Contracting Party. In Ireland, the Legal Aid Board is the appointed authority. This little known but potentially valuable service is not publicised by the Legal Aid Board and there are no statistics relating to the service in the Board's annual reports.

An Additional Protocol<sup>72</sup> was added to the Agreement in 2001 which deals largely with difficulties in communication between lawyers and applicants. It provides, *inter alia*, that the costs of translation and/or interpretation should be covered by the State which receives an application for legal aid. Ireland has ratified the main Agreement. It has signed the Protocol but has not yet ratified it.<sup>73</sup>

Two other international treaties, the *European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children* (the Luxembourg

Convention) and *Convention on the Civil Aspects of International Child Abduction* (the Hague Convention), are given the force of law in Ireland by the Child Abduction and Enforcement of Custody Orders Act 1991 and the Protection of Children (Hague Convention) Act 2000. Both provide for legal aid in child abduction cases, at least to the applicant parent.<sup>74</sup>

## 1.6.2 European Union

### Brussels I Regulation

An important development in legal aid at international level came with the enactment of the (now repealed) Jurisdiction of Courts and Enforcement of Judgements (European Communities) Act 1988, giving effect to the EEC Judgements Convention. This Convention has been replaced by Regulation 44/2001, commonly called the 'Brussels I Regulation'.<sup>75</sup> Both of these instruments deal with the enforcement in one EU jurisdiction of civil and commercial judgments obtained in another. Article 50 of the Regulation stipulates

An applicant who, in the Member State of origin has benefited from complete or partial legal aid or exemption from costs or expenses, shall be entitled, in the procedure provided for in this Section, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State addressed.<sup>76</sup>

As a Regulation is an instrument of general scope that is binding in its entirety and is directly applicable in all Member States, no domestic legislation is necessary to give effect to the Brussels I Regulation.

### European Court of Justice

The European Court of Justice Rules of Procedure, Rule 76 and Additional Rules 4 and 5 provide for legal aid in proceedings before it.<sup>77</sup> The court operates a means and merits test and legal aid, if granted, is paid out of the court's own treasury.

### European Union Charter of Fundamental Rights

Despite attempts by various institutions of the European Union to enshrine the right to legal aid in European law, there has generally been reluctance on the part of Member States to adopt such measures. In recent years, however, there appears to be a shift towards making access to justice a more tangible concept. Thus, in the EU Charter of Fundamental Rights there is a commitment to justice and to the provision of legal aid across the European Union, insofar as it relates to the implementation of Union law. Article 47 states:

- (1) Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
- (2) Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
- (3) Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.<sup>78</sup>

Each year, the EU Network of Independent Experts on Fundamental Rights issues annual reports on EU member states and a synthesis report on all member states, measuring compliance with the rights set out in the Charter. In its *Synthesis Report 2002*, the Network clarified that the expression "legal aid" in Article 47(3) of the Charter actually refers to the right to both legal advice and legal assistance. The report also notes that "as civil parties in certain cases benefit from the guarantees of Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms, there is no *a priori* reason for not extending the benefit of legal aid."<sup>79</sup>

### **EU Directive 2003/8/EC to improve access to justice in cross-border disputes**

The EU Network of Independent Experts on Fundamental Rights considered EU Directive Number 2003/8/EC in its *Synthesis Report 2003*. It stated that the Directive will “play an important role in guaranteeing effective access to justice to litigants seeking to sue another person or to have a judicial decision enforced in a Member State other than the one in which the litigant is domiciled or habitually resides”.<sup>80</sup>

One of the EU’s objectives is the maintenance and development of an area of freedom, security and justice in which the free movement of persons is ensured. Article 61(c) of the consolidated Treaty on European Union and the Treaty Establishing the European Community<sup>81</sup> envisages measures relating to judicial cooperation in civil matters, in order to progressively establish this area. Article 65(c) provides for the adoption of measures eliminating obstacles to good function of civil proceedings. The Directive to improve access to justice in cross border disputes, adopted on 27 January 2003, aiming to bring about a common legal aid regime for such disputes, is one of those measures.<sup>82</sup> The right to legal aid as articulated in Article 47 of the EU Charter of Fundamental Rights, forms part of the *Preamble*.

- (5) This Directive seeks to promote the application of legal aid in cross-border disputes for persons who lack sufficient resources where aid is necessary to secure effective access to justice. The generally recognised right to access to justice is also affirmed by Article 47 of the Charter of Fundamental Rights of the European Union.  
[...]
- (10) All persons involved in a civil or commercial dispute within the scope of this Directive must be able to assert their rights in the courts even if their personal financial situation makes it impossible for them to bear the costs of the proceedings. Legal aid is regarded as appropriate when it allows the recipient effective access to justice under the conditions laid down in this Directive.<sup>83</sup>

Article 3 sets out the entitlement to legal aid:

Natural persons involved in a dispute covered by this Directive shall be entitled to receive appropriate legal aid in order to ensure their effective access to justice in accordance with the conditions laid down in this Directive.<sup>84</sup>

The Directive allows Member States to set their own income thresholds and provides that these should be defined in the light of various objective factors. Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 30 November 2004.

Unlike regulations, directives are not directly applicable. Rather, a directive is a legislative instrument that is binding on the Member States to whom it is addressed as regards the result to be obtained, but leaves the States free to determine the form and methods used to achieve the result. According to a representative of the Department of Justice, Equality and Law Reform, no implementing legislation is necessary to transpose this Directive into Irish law, as the existing arrangements for legal aid in cross-border cases meet the requirements of the Directive. The Department has informed the European Commission that the Legal Aid Board is the Transmitting and Receiving Authority in Ireland for the purposes of the Directive. According to a representative of the European Commission, despite the fact that the transposition date has passed, the Irish Government has yet to communicate to the Commission its implementing measures in this area.<sup>85</sup>

## Conclusions

There is a clearly established human right of equal access to justice which is a fundamental human right and which must be respected for all, by all. It is a necessary corollary to this right that there be a right to legal aid to implement the fundamental right of access to justice and to an effective remedy.

Cases taken in the Irish and in the European Courts have been important in elaborating that right. In all of the cases that have been cited, important issues were at stake for disadvantaged individuals who sought a remedy for what they claimed was a breach of their rights. Their access to the courts was hampered by their inability to pay the high costs associated with litigation. The case law is particularly important in Ireland because there is no express right to legal aid in the Irish Constitution. As recently as the case of *O'Donoghue v the Legal Aid Board*, the State denied that any such right existed in an argument which was roundly rejected by the court. While slow to commit the State to a comprehensive system of civil legal aid, the courts have established that, for certain litigants, civil legal aid is a human right as part of the right of access to law and to justice.

However the interpretation of the right by the courts in individual cases is only part of the application of law. Law is also manifested in legislation, and in the practices and procedures of those who administer the law. The Irish Constitution does not expressly articulate the right to legal aid. Even in the Civil Legal Aid Act 1995, there is no clear statement that legal aid is an entitlement, when it is needed to access justice. It should not be necessary for individuals to litigate against the State before their right to legal aid is recognised and vindicated. The State has ratified the European Convention on Human Rights, and the EU Charter of Fundamental Rights, both of which recognise the right to legal aid. The only entity to which the State has not explicitly acknowledged the right is its own people. It should do so, by codifying in legislation the rights of access to the courts and to justice.

The continuing exclusion of certain types of law from the civil legal aid scheme, regardless of the need of the person for legal aid, constitutes a manifest contravention of the right of access to justice. In circumstances where the ECtHR has condemned such a blanket exclusion in the UK - where the law was very similar to our own - Irish law needs to be amended. Delay in doing this is merely deferring the inevitable.

With the incorporation of the ECHR into Irish domestic law in 2003, all government departments as well as statutory organisations such as the Legal Aid Board are now bound to act, as far as possible, in a manner which is compatible with Ireland's obligations under the ECHR. The Department of Justice, Equality and Law Reform, the Department of Finance and the Legal Aid Board are all "organs of State" whose actions directly affect the right to legal aid. The system of civil legal aid operates through the Legal Aid Board. The Minister for Justice, Equality and Law Reform prescribes the conditions under which civil legal aid and advice are available, appoints the Board members, and can prescribe legal aid policy directives. The Minister for Finance holds a veto over the budget for legal aid. The State in general and these three agencies in particular are therefore bound to act in a manner which vindicates individuals' right to civil legal aid. This means that all of their policies, practices and procedures must be consistent with the vindication of the right of persons to civil legal aid where that is needed to access justice.

The standard for Government and for the Board, then, is the one articulated in *Airey v. Ireland*, that the right of access to justice is not maintained as something theoretical and illusory, but rather is made practical and effective. It is therefore incumbent on all those who provide the legal aid service to make sure that the law, regulations, policy and practice relating to legal aid respect, protect and promote the right to legal aid, in a practical and effective way.

The Department of Finance is rarely called to account for its part in vindicating – or failing to vindicate – the right to legal aid. The *O'Donoghue* case served as a signal to demonstrate how important it is for all state organs, including those which hold the purse strings to perform their functions in a manner which takes account of, and acts in accordance with human rights principles. Thus it clearly follows that the Department of Finance must ensure that there is sufficient provision for civil legal aid for those who need it to access justice.

Under the Civil Legal Aid Act 1995, policy direction for the Legal Aid Board is entrusted to the Department of Justice, Equality and Law Reform. When questions have been raised over many years about the adequacy of the service provided, successive Ministers have side-stepped their responsibilities by suggesting that the Legal Aid Board alone was responsible for its destiny. The High Level Goal of the Department of Justice, Equality and Law Reform is limited to supporting the Legal Aid Board.<sup>86</sup> This is insufficient. With capacity to introduce primary legislation and to make regulations and policy, the Minister for Justice, Equality and Law Reform has a statutory obligation and must ensure that the Department's strategy and actions respect, vindicate and, even further, promote the right of every person to access justice equally. This will apply equally to its dealings with the Legal Aid Board and the Department of Finance. It must ensure that enough resources are in place to ensure civil legal aid to those who need it.

The Legal Aid Board, too, must ensure that all of its actions, procedures and policies are human rights-compliant. This obligation means that the Board has to think in a broader framework. Currently, the Board assumes that the service offered is satisfactory. While some annual reports of the Legal Aid Board have tentatively suggested that lack of budgetary resources have impacted on services, the Board has failed to spell out the unacceptable constraints which forced it to work in conditions that deprived clients of the Law Centres of a reasonable service. That denial of an adequate legal service was a denial of its clients' human rights, however it arose. The current priority of the Legal Aid Board is to operate within its resources, when in fact the vindication of the rights of those who require access to civil legal aid to access justice should be its first priority.

## Notes

<sup>1</sup> Civil Legal Aid Act 1995.

<sup>2</sup> Minister Mervyn Taylor, Seanad Éireann, Volume 141, 16 February, 1995. Civil Legal Aid Bill, 1995: Second Stage.

<sup>3</sup> Committee on Civil Legal Aid and Advice (1977) *Report to the Minister for Justice (Pringle Report)*.

<sup>4</sup> *Ibid.*, p. 22.

<sup>5</sup> *Airey v. Ireland* 6289/73 [1979] 2 EHRR 305 (9 October 1979), [1981] ECHR1 (6 February 1981).

<sup>6</sup> Civil Legal Aid Act 1995. Long title.

<sup>7</sup> Civil Legal Aid Regulations 1996 (S.I. No. 273 of 1996).

<sup>8</sup> While FLAC welcomed the 1995 Act, it expressed disappointment that the opportunity to extend the Scheme to all areas of the law had not been taken and that test cases and Employment Appeal Tribunal and Social Welfare Tribunal work remained excluded. FLAC Chairperson, Ms Iseult O'Malley, pointed out that comprehensive legal aid should include education on individual rights under the law, as well as representation ("Lawyers criticise flaws in Civil Legal Aid Act" by Carol Coulter, *Irish Times*, 14 October 1996).

<sup>9</sup> Civil Legal Aid Act 1995, Section 3(3).

<sup>10</sup> *Ibid.*, Section 5(3).

<sup>11</sup> *Ibid.*, Section 5(2).

<sup>12</sup> *Ibid.*, Section 6.

<sup>13</sup> *Ibid.*, Section 7.

<sup>14</sup> *Ibid.*, Section 8.

<sup>15</sup> *Ibid.* Section 19(2).

<sup>16</sup> *Ibid.*, Section 24.

<sup>17</sup> *Ibid.*, Sections 26-29.

<sup>18</sup> *Ibid.*, Section 30.

<sup>19</sup> *Ibid.*, Section 37(1).

<sup>20</sup> Human Rights Commission Act 2000, Section 10.

<sup>21</sup> *Ibid.*, Section 11.

<sup>22</sup> *Ibid.*, Section 8(h).

<sup>23</sup> For the criteria used by the Equality Authority to qualify for free legal assistance, see its website <http://www.equality.ie> (last viewed 12 July 2005).

<sup>24</sup> Constitution Review Group (1996) *Report of the Constitution Review Group*, p. 236.

<sup>25</sup> *O'Donoghue v. The Legal Aid Board, The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2004] IEHC 413, 21 December 2004, Kelly J.

<sup>26</sup> This case turned on Ms O'Donoghue's constitutional right of access to the courts and to constitutional justice. Her right to civil legal aid arose in the context of those constitutional standards.

<sup>27</sup> *O'Shaughnessy v. Attorney General*, unreported, High Court, 16 February 1971, O'Keefe P.

<sup>28</sup> *M.C. v. Legal Aid Board* [1991] 2 I.R. 43.

<sup>29</sup> *Ibid.*, p. 55.

<sup>30</sup> *Corcoran v. Minister for Social Welfare* [1991] 2 IR, p. 175.

<sup>31</sup> *Mac Gairbhith v Attorney General* [1991] I.R. 412, p. 431.

<sup>32</sup> *Stevenson v. Landy & others*, unreported, High Court, 10 February 1993, Lardner J.

<sup>33</sup> *Kirwan v. Minister for Justice, Ireland and the Attorney General* [1994] 1 ILRM 444.

<sup>34</sup> *Byrne v Judge James Scally and the Right Honourable the Lord Mayor Aldermen and Burgesses of Dublin* [2000] IEHC 72 (12 October, 2000).

<sup>35</sup> *Ibid.*, p. 33. The law on such eviction applications is still in development. See the remarks of the Supreme Court in *Dublin City Council v. Fennell* [2005] IESC 33 (12 May 2005) where the compatibility of Section 62 of the Housing Act 1966 with Article 6 of the European Convention on Human Rights was raised.

<sup>36</sup> [See note 25 above.]

<sup>37</sup> The term 'unenumerated' refers to those rights which are not explicitly stated but are implied under the personal rights articles in the Constitution.

<sup>38</sup> *O'Donoghue v. The Legal Aid Board*, pp36-37.

<sup>39</sup> *Ibid.*, p.44.

<sup>40</sup> *Ryan v. Attorney General* [1965] I.R. 294.

<sup>41</sup> *O'Donoghue v. The Legal Aid Board*, p.44.

<sup>42</sup> Council of Europe *Convention for the Protection of Human Rights and Fundamental Freedoms*, done at Rome,

4 November 1950, CETS No. 005. Entry into force 3 September 1953. Ratified by Ireland, 25 February 1953.

<sup>43</sup> *Airey v. Ireland*.

<sup>44</sup> *Ibid.* para. 24.

<sup>45</sup> *Fransson v. Sweden* (8719/02) [2004] 39 EHRR SE1 (16 March 2004).

<sup>46</sup> *Bertuzzi v. France* (36378/97) [2003] ECHR 81 (13 February 2003).

<sup>47</sup> *Duyonov & ors v. The United Kingdom* (36670/97) [2001] ECHR 559 (2 October 2001) (friendly settlement).

<sup>48</sup> Article 13 of the ECHR describes the right to an effective remedy.

<sup>49</sup> *X v. The United Kingdom* (7215/75) [1980] Commission decision of 10 July 1980, DR 21, p. 95.

<sup>50</sup> *Aerts v. Belgium* (2357/94) [1998] ECHR 64 (30 July 1998).

<sup>51</sup> *Ibid.*, para. 60.

<sup>52</sup> *Del Sol v France* (46800/99) [2002] 35 EHRR 38 (26 February 2002).

<sup>53</sup> *Ibid.*, para. 26.

<sup>54</sup> *McVicar v. The United Kingdom* (46311/99) [2002] ECHR 431 (7 May 2002).

<sup>55</sup> *Ibid.*, para. 53.

<sup>56</sup> *Steel & Morris v. The United Kingdom* (68416/01) [2005] ECHR (15 February 2005).

<sup>57</sup> Speech by Minister for Justice, Equality & Law Reform, Michael McDowell TD at the Conference of the Irish Society for European Law on "The European Convention on Human Rights and the Media", 4 May 2005.

<sup>58</sup> Civil Legal Aid Act 1995, Section 28(9)(a). There is an exception where the claim for defamation arises by way of counterclaim in other proceedings against a legally aided litigant who has issued other proceedings. Civil Legal Aid Act 1995, Section 28(9)(b).

<sup>59</sup> *Webb v. The United Kingdom* (9353/81) [1983] 6 EHRR, p. 120.

<sup>60</sup> *Doran v. Ireland* (50389/99) [2003] ECHR 417 (31 July 2003).

<sup>61</sup> *Ibid.*, para. 55.

<sup>62</sup> *Ibid.*, para. 69.

<sup>63</sup> Kilkelly (2004) *ECHR and Irish Law*, p. lviii.

<sup>64</sup> For example, judicial review proceedings of administrative actions, where orders may include quashing a decision or ordering an action or damages.

<sup>65</sup> It has been suggested that this is premised on the notion of tortious breach of statutory duty (see O'Connell (2003) "The ECHR Act 2003: A Critical Perspective," in Kilkelly, *ECHR and Irish Law*, p. 3). In the UK, cases have resulted in costs and penalties ranging from £18,000 to £320,000 (see Audit Commission (UK) (2003) *Human Rights: Improving Public Service Delivery*, p. 4).

<sup>66</sup> The long title to the European Convention on Human Rights Act 2003 is: "An Act to enable further effect to be given, subject to the Constitution, to certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November 1950 and certain protocols thereto, to amend the Human Rights Commission Act 2000 and to provide for related matters".

<sup>67</sup> Hogan D. "The Implications of the right to respect for private and family life under Article 8 of the European Convention on Human Rights for persons with a disability in Ireland". Paper delivered to conference on *Human Rights and Disability Discrimination: Exploring the value added by the ECHR and other sources of European Law* at NUI Galway, 25 September 2004.

<sup>68</sup> This is not to be confused with the Council of Ministers of the European Union (see below, Section 1.6.2.).

<sup>69</sup> Committee of Ministers, *Resolution (78)8 on Legal Aid and Advice*, 2 March 1978.

<sup>70</sup> *Recommendation R(93) 1 of the Committee of Ministers to Member States on Effective Access to Justice to the Law and to Justice for the Very Poor*; adopted by the Committee of Ministers on 8 January 1993 at the 484th meeting of the Ministers' Deputies.

<sup>71</sup> Council of Europe. *European Agreement on the Transmission of Applications for Legal Aid*. CETS No. 092. Opened for signature at Strasbourg 27/1/1977. Entry into force 28/2/1977.

<sup>72</sup> Council of Europe. *Additional Protocol to the European Agreement on the Transmission of Applications for Legal Aid*. CETS No. 179. Opened for signature at Moscow 4/10/2001. Entry into force 1/9/2002.

<sup>73</sup> See Convention website <http://conventions.coe.int/Treaty/en/CadreListeTraites.htm> (last viewed 12 July 2005).

<sup>74</sup> Ireland has also signed, but not yet ratified, the *European Convention on the Exercise of Children's Rights* (1996) which contains legal aid provisions.

<sup>75</sup> Regulation 44/2001, OJ L12/1, 16 January 2001. The European Communities (Civil and Commercial Judgment) Regulations 2002 SI 52/2002 set out the procedures for the operation of the EU Regulation in Ireland.

<sup>76</sup> In its *Consolidated Circular of 2000* at Section 23-1, the Legal Aid Board interpreted this as meaning that the means and merits tests (discussed later in this report in Chapter 3) do not apply and no contribution is payable to the Legal Aid Board for legal aid supplied at the initial stage of the judgment enforcement process.

<sup>77</sup> Rule 76 provides that “[a] party who is wholly or in part unable to meet the proceedings may at any time apply for legal aid. The application shall be accompanied by evidence of the applicant’s need of assistance, and in particular by a document from the competent authority certifying his means.”

<sup>78</sup> *Charter of Fundamental Rights of the European Union*, agreed at Nice in December 2000, OJ C364/1, 7 December 2000).

<sup>79</sup> EU Network of Independent Experts on Fundamental Rights (2003) *Synthesis Report on the situation of Fundamental Rights in the European Union and its member states 2002*, p. 250.

<sup>80</sup> EU Network of Independent Experts on Fundamental Rights (2004) *Synthesis Report on the situation of Fundamental Rights in the EU in 2003*, p.158.

<sup>81</sup> OJ C3251, 24 December 2002.

<sup>82</sup> *Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes*, OJ L26/46, 31 January 2003

<sup>83</sup> *Ibid.*, Preamble, p. 41.

<sup>84</sup> *Ibid.*, Article 3(1) p. 43.

<sup>85</sup> E-mail from Commission Representation in Ireland to FLAC, 16 May 2005. Re: Implementation of EU Directive.

<sup>86</sup> High Level Goal 13 of the Strategy Statement of the Department of Justice Equality & Law Reform 2005-2007, in relation to civil legal aid, is to facilitate access to justice by “in relation to civil legal aid by supporting the Legal Aid Board in providing the best possible service to its clients within the resources made available to it”. See Department of Justice, Equality & Law Reform website <http://www.justice.ie> (last viewed 12 July 2005).

## Chapter 2

# Scope of the Civil Legal Aid Scheme in Ireland

### 2.1 Introduction

The scope of civil legal aid in Ireland is defined by the Civil Legal Aid Act 1995 and the regulations that have been made by the Minister for Justice, Equality and Law Reform.

If the right to legal aid is to be respected, a civil legal aid scheme must address unmet legal need. Instead of doing so, the Irish scheme provides a service which is focused almost exclusively on family law and where delay and lack of resources introduce significant barriers to the right of access to civil legal aid.

### 2.2 The Civil Legal Aid Act 1995

The civil legal aid scheme set up under the Civil Legal Aid Act 1995 is administered through the Legal Aid Board. In its *Corporate Plan 2003-2005*<sup>87</sup> the Legal Aid Board sets the boundaries of its services. It says that the “Board’s statutory remit and the level of resources provided are the main determinants of the range and responsiveness of the services provided by the organisation”. However, the Board’s function, as set out in the Act is wider than the service actually delivered. Its principal function as set out in Section 5 (1) of the Act is 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 the Act.<sup>88</sup>

Both legal advice and legal aid are explicitly defined in the Act.

In this Act, subject to section 26(4), “legal advice” means any oral or written advice given by a solicitor of the Board or by a solicitor or barrister engaged by the Board for that purpose under section 11 –

- a) on the application of the law of the State to any particular circumstances which have arisen in relation to the person seeking the advice, and
- b) as to any steps which that person might appropriately take having regard to the application of the law of the State to those circumstances,

and includes any assistance given by such a solicitor or barrister, to any person in taking any such steps as are referred to in paragraph (b), whether by assisting a person in taking any such steps on his or her own behalf or taking any such steps (other than the institution or conduct, including defence, of civil proceedings) on the person’s behalf.<sup>89</sup>

Section 26(4), which qualifies the mandate of the Board in relation to legal advice, refers to advice given on foreign law. It provides that:

Where a person would qualify for legal advice, but for the fact that the advice sought concerns the application of the law of another State, such person shall be entitled to obtain such guidance or assistance in relation to the matter as the Board deems appropriate.<sup>90</sup>

It will be seen from the above definition that the Board has a wide scope to give legal *advice* through its solicitors and barristers but the permission to give advice stops short of *acting* for a client in court proceedings. The client who wants access to the courts must seek legal aid.

The Act defines legal aid as follows:

(1) In this Act “legal aid” means representation by a solicitor of the Board, or a solicitor or barrister engaged by the Board under *section 11*, in any civil proceedings to which this section applies and includes all such assistance as is usually given by a solicitor and, where appropriate, barrister in contemplation of, ancillary to or in connection with, such proceedings, whether for the purposes of arriving at or giving effect to any settlement in the proceedings or otherwise.

(2) This section applies to all civil proceedings other than those relating to designated matters in respect of which there is not for the time being an order in force under *subsection (10) of section 28*—

- a) conducted in the District Court, the Circuit Court, the High Court or the Supreme Court, or
- b) conducted in any court or before any tribunal for the time being prescribed by the Minister, with the consent of the Minister for Finance, by order under this section,

including proceedings arising out of or connected with such proceedings conducted before an officer of such court or tribunal, by its direction and proceedings under Article 177 of the Treaty establishing the European Economic Community, signed at Rome on the 25th day of March, 1957.<sup>91</sup>

The statutory definition of “legal aid” was extended by Section 35(2) of the Sex Offenders Act 2001 to mean representation, by a solicitor or barrister engaged by the Legal Aid Board, of a rape complainant who is liable to examination on his or her previous sexual history.

In addition to its principal function, specified in Section 5(1), the Board’s statutory remit extends to providing an information service. Section 5(2) stipulates that

[t]he Board shall, to such extent and in such manner as it considers appropriate, disseminate, for the benefit of those for whom its services are made available, information in relation to those services and their availability.

To date, the Legal Aid Board has disseminated information about its services by producing a series of legal aid leaflets which are available on paper and via its website. Apart from an advertisement in the *Sunday Tribune* newspaper, it has not promoted its service through other media or publicity.<sup>92</sup> This current level of publicity leaves a gap in information provided to the public on the service’s existence.

Some 779 respondents to a survey carried out by FLAC in 32 participating centres throughout Ireland were asked if they had ever heard of the Legal Aid Board. The majority, 51.7% had never heard of it.<sup>93</sup> These results, coupled with the finding of Kelly J in *O’Donoghue v Legal Aid Board and Others* that Ms O’Donoghue did not even know of the existence of a legal aid service in Cork in the mid 1990s, make it clear that there still is a gap in information provided to the public on the service’s existence.

In addition to the statutory powers conferred by the Act, the Minister for Justice, Equality & Law Reform (the Minister) retains the power to issue general directives as to policy in relation to legal aid and advice. Section 7 of the Act states:

- (1) The Minister may, by order, from time to time as occasion requires, issue to the Board such general directives as to policy in relation to legal aid and advice as he or she considers necessary.
- (2) The Board shall, in performing its functions, comply with any directive under this section.
- (3) Nothing in this Act shall be construed as enabling the Minister to exercise any power or control in relation to any particular case with which the Board is or may be concerned.

Any such directives as may have been issued to date have not been made public by the Legal Aid Board in any of its circulars or annual reports.

Section 24 outlines the general criteria for the grant of legal aid and advice:

Without prejudice to the other provisions of this Act, a person shall not be granted legal aid or advice unless, in the opinion of the Board—

- a) a reasonably prudent person, whose means were such that the cost of seeking such services at his or her own expense, while representing a financial obstacle to him or her would not be such as to impose undue hardship upon him or her, would be likely to seek such services in such circumstances at his or her own expense, and
- b) a solicitor or barrister acting reasonably would be likely to advise him or her to obtain such services at his or her own expense.

Apart from matters designated as excluded by the Act, the Board is obliged to provide civil legal services to those who satisfy the financial and other criteria.

### 2.3 Areas excluded

Section 28(9)(a) of the Act excludes nine separate “designated matters” from the scope of the Legal Aid Scheme. Even in these designated matters however, the Board is at liberty to give legal advice, even though it is not allowed to provide legal representation. Under Section 28(10), the Minister, with the consent of the Minister for Finance, may extend the Legal Aid Scheme to cover any of the designated matters listed in the subsection. The Minister has never done so.

The designated matters excluded are:

- (i) defamation;<sup>94</sup>
- (ii) disputes concerning rights and interests in or over land;
- (iii) civil matters within the jurisdiction of the District Court (Small Claims Procedure) Rules, 1993;
- (iv) licensing;<sup>95</sup>
- (v) conveyancing;<sup>96</sup>
- (vi) election petitions;
- (vii) where an application is made in a representative, fiduciary or official capacity and the Board, having regard to any source from which the applicant is or may be entitled to be indemnified in respect of the costs of the proceedings concerned and any resources of the persons who would be likely to benefit from a successful outcome of the proceedings for the applicant, is of opinion that legal aid should not be granted;
- (viii) a matter the proceedings as respects which, in the opinion of the Board, are brought or to be brought by the applicant as a member of and by arrangement with a group of persons for the purpose of establishing a precedent in the determination of a point of law, or any other question, in which the members of the group have an interest;<sup>97</sup>
- (ix) any other matter as respects which the application for legal aid is made by or on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned.<sup>98</sup>

While the Act provides for legal aid in certain circumstances where the subject of dispute is the applicant’s family home and refusal of aid would cause hardship,<sup>99</sup> some cases of particular hardship remain excluded from the Scheme. In the High Court cases of *Dublin Corporation v. Hamilton*<sup>100</sup> and *Byrne v. Scally and Dublin Corporation*,<sup>101</sup> both applicants failed to establish the right of legal representation in defending eviction proceedings taken by Dublin Corporation pursuant to Section 62(3) of the Housing Act 1966. Because such cases are excluded from the scope of the statutory legal aid scheme, Ms Byrne claimed a right to legal aid under the Constitution. In that case, it was clear that eviction would cause hardship as it would render her, her husband, her adult son and four dependent children homeless. Nonetheless, O’Caoimh J held, following the decision of Geoghegan J in *Hamilton*, that applications for possession taken by public authorities under Section 62(3) of the Housing Act 1966 are “straightforward and relatively simple.”<sup>102</sup> On this basis, he differentiated

the case from *Stevenson v Landy* and found that the constitutional justice did not demand that legal aid be given.<sup>103</sup> This case was decided before the enactment of the European Convention on Human Rights Act 2003. Given the acknowledgement by the Supreme Court in *Dublin City Council v Fennell*,<sup>104</sup> decided in May 2005, of the complexities which have to be determined in such cases, no justification remains for denying civil legal aid to tenants in such cases and their right to legal representation should be recognised.<sup>105</sup> To date, no challenge has been taken against the Legal Aid Board and the Department of Justice for the refusal of legal aid for such ejection proceedings by local authorities but the potential for such challenge, particularly by an interested non-governmental organisation, or by the Irish Human Rights Commission, remains.

The relative denial of rights to legal aid for those in public housing in the Republic of Ireland compared to similar tenants in Northern Ireland remains one area where an equivalence of rights between the two parts of the island is unrealised.<sup>106</sup> It is useful to compare the position in England and Wales in this area, where the entitlement to legal aid is set out in the UK Legal Services Commission's *Funding Code*.<sup>107</sup> This acknowledges that in cases involving housing, the cost-benefit test is applied in a way which requires that the "likely benefits of the proceedings justify the likely costs, having regard to the prospects of success and all other circumstances."<sup>108</sup> Where a case is of "overwhelming importance to the client" the Code also allows funding to be granted even though the prospects of success are only borderline. Such cases could involve the issue of the client's accommodation.<sup>109</sup>

## 2.4 Legal Aid and Tribunals

Legal aid under the Irish Scheme is currently confined to some specified civil proceedings conducted in the District, Circuit, High or Supreme Courts. By Ministerial Order the Scheme can be extended to apply to proceedings before any prescribed tribunal. Apart from orders made to permit legal aid to applicants appearing before the Refugee Appeals Tribunal<sup>110</sup>, the Minister has not allowed the scheme to apply to proceedings before any administrative tribunals, including Social Welfare Appeals, the Equality Tribunal or the Employment Appeals Tribunal.<sup>111</sup>

It is suggested that tribunals are intended to be relatively informal, and that legal representation works against the objective of accessibility to users.<sup>112</sup> It is also argued that tribunal costs are reduced if legal representation is excluded. However, even those who make such arguments recognise that there will always be cases where the requirements of justice demand legal representation. The *Leggatt* report, commissioned as an expert report by the UK government, although advocating a reduction in the number of cases where legal representation is needed, accepted that some tribunal decisions had serious consequences and that "a complex and rapidly developing body of case law meant that few appellants could realistically be expected to prepare and present their cases themselves".<sup>113</sup> The same report found a marked difference in the quality of various tribunals in the United Kingdom and contained many recommendations for their reform.

In 1991, the Law Society of Ireland's *Report on Civil Legal Aid* recommended that the remit of the Legal Aid Board should be extended to include all tribunal work. The report, compiled by the Society's Committee on Civil Legal Aid, was critical of the fact that legal representation was confined to the courts and excluded representation at the Employment Appeals Tribunal, stating:

We are strongly of the view that the scheme should be extended to cover representation of persons before tribunals, particularly the Employment Appeals Tribunal. This is in accordance with the recommendations of the Pringle Committee. It seems to us that the Tribunals are operating under various statutory provisions which have jurisdictions and powers that can substantially affect individual rights. It is important that persons appearing before such tribunals should have adequate legal representation and that, where such persons cannot afford the cost of solicitors, legal aid is available. The Government should bear in mind in considering this recommendation, that while it would necessitate additional finance to extend the scheme to tribunals, the availability of legal assistance at the tribunal stage could so affect the outcome of a case as to render an appeal to the Circuit Court unnecessary.<sup>114</sup>

The further report of the Law Society's Family Law and Civil Legal Aid Committee in 2000 again recommended that the current remit of the Legal Aid Board should be expanded to include all tribunal work.

The right to a fair hearing involves the right to legal aid where a person needs it in order to access justice. Justice is dispensed through Tribunals, as well as the courts. Many hearings before Rights Tribunals involve complicated subject matter with complex issues of law to be decided. In these circumstances, the blanket exclusion of the right to legal aid in all tribunal cases other than the Refugee Appeals Tribunal offends against the right to a fair hearing guaranteed in Irish and international human rights law. It is worth considering some of the issues with which Tribunals deal.

#### 2.4.1 Social Welfare Appeals Office

Social welfare appeals can be highly complicated. An example of such a complicated appeal arises where the subject under discussion is the "Habitual Residence Condition". Since 1 May 2004, an applicant for child benefit or for social assistance payments - including carer's allowance, disability allowance, non-contributory old age pension, unemployment assistance or normal supplementary welfare allowance - has to satisfy the Department of Social and Family Affairs that he or she meets the Habitual Residence Condition. If a person cannot satisfy the Department that they have been resident in Ireland for the previous two years, he or she may be refused social assistance. This applies whether the person is originally from Ireland, another EU state or from a third country.

Such a refusal may be appealed to a tribunal called the Social Welfare Appeals Office. At the appeal, the Appeals Officer will assess the complex legal issue of 'residence' and 'habitual residence'. This assessment will be based on five criteria established by the case law of the European Court of Justice, as well as on the facts of the case. These criteria are:

- applicant's main centre of interest;
- length and continuity of residence in a particular country;
- length and purpose of absence from a country;
- nature and pattern of employment in a country; and
- future intention of applicant concerned as it appears from all the circumstances.

Appellants may supply their own legal representation, and may, at the discretion of the Appeals Officer, be awarded a contribution towards that. The Legal Aid Board is not authorised to provide representation as this is a tribunal. The determination of this issue is at least as complex, and may be more crucial to a person's fundamental right of access to justice, as many matters which are covered under the mandate of the Legal Aid Board.

#### 2.4.2 Representation before the Employment Appeals Tribunal

In an explanatory leaflet on the Employment Appeals Tribunal issued by the Department of Enterprise, Trade and Employment, under 'Informality of Hearings', it is stated:

The actual hearing is conducted in a relatively informal but structured manner. If required, the Tribunal will assist a party in the presentation of his/her case by asking questions in order to elicit the relevant facts and an unrepresented appellant should therefore be assured that his/her case will not be prejudiced in any way.<sup>115</sup>

While this guidance seems reassuring, in practice the EAT functions much as a court. A substantial body of employment law now springs directly from increasingly complex European Union law. Claims in the area of dismissal may encompass issues such as transfer of undertakings, unfair selection for redundancy, procedural fairness and maternity protection. In these circumstances, there is a risk that certain individuals, particularly when making complex and technical claims, may not be able to present their cases in the manner that fairness demands.

Given the complexity of the law and the importance to both parties of the decision, it is no surprise to learn that, in practice, it is common for parties to have legal representation at the Employment Appeals Tribunal. By way of illustration, in its 35th annual report in 2002 the EAT sets its total number of cases involving claims under the Unfair Dismissals Acts 1977 to 2001 at 779:

- 597 employee parties (76.6%) were represented (89 by trade unions, 484 by solicitor and/or counsel and 24 by other persons).
- 519 employer parties (66.6%) were represented (75 by employers' associations, 399 by solicitor and/or counsel and 45 by other persons). This does not include representation by in-house human resource personnel, who may have considerable experience in this area.

None of these parties were entitled to legal aid representation.

#### 2.4.3 Representation before the Equality Tribunal

Equally, civil legal aid is not available in hearings before an Equality Officer or the Labour Court under the Employment Equality Act 1998 or the Equal Status Act 2000.<sup>116</sup> Sometimes, the Equality Authority will instigate the case itself and it occasionally represents clients. However, where the claimant initiates the action, and is not represented by the Equality Authority, the failure of legal aid at this tribunal can be a barrier to accessing justice.

Much of this legislation stems from EU Directives and there is a large body of European Court of Justice case law that is relevant in these areas. Some of the concepts in equality law may be difficult for an unrepresented claimant to grasp. An example of this is indirect discrimination, which involves showing that an apparently neutral requirement or provision operates to discriminate against a person or persons on a specified discriminatory ground as well as presenting statistical evidence to back the claim. This constitutes complex matter, needing a sophisticated understanding of the law of discrimination where the lack of legal aid may prevent a person who suffers discrimination from even recognising the legal discrimination, and therefore, prevents the person pursuing a claim to end it.

### 2.5 Unmet Legal Need in the Legal Aid Scheme

Certain areas of law may not be specifically excluded from the scheme by legislation or regulation, but rather by the operation of the system itself. Civil legal aid concentrates very heavily on family law, reducing the service far below its potential and ignoring substantial areas of legal need. Long waiting lists may make the scheme available only to those who have sufficient time to wait their turn. This has resulted in delays of more than two years in some cases before an appointment was given.<sup>117</sup>

The limitations of the service are illustrated by the narrow range of cases set out in the Legal Aid Board *Annual Report 2003*.<sup>118</sup> FLAC's information line and legal advice centre figures for the same year, on the other hand, would indicate that those in need of a legal service are concerned with a wider variety of matters.

#### 2.5.1 Legal Aid Board legal representation statistics

Statistics from the Legal Aid Board annual reports since 1995 show that there is a predominance of family law cases and that other areas figure only marginally. The figures in the table below show that the percentage of non-family law cases has never risen above 3.72%.

**Table1: Distribution of Legal Aid Board case work between family/non-family law, 1995-2003**

| Year | Family Law      |        | Non-Family Law  |       | Total |      |
|------|-----------------|--------|-----------------|-------|-------|------|
|      | Number of Cases | %      | Number of Cases | %     | Cases | %    |
| 2003 | 4,379           | 98.18% | 81              | 1.82% | 4,460 | 100% |
| 2002 | 5,306           | 97.04% | 162             | 2.96% | 5,468 | 100% |
| 2001 | 4,960           | 97.97% | 103             | 2.03% | 5,063 | 100% |
| 2000 | 4,786           | 96.28% | 185             | 3.72% | 4,971 | 100% |
| 1999 | 5,003           | 97.16% | 146             | 2.84% | 5,149 | 100% |
| 1998 | 5,288           | 97.13% | 156             | 2.87% | 5,444 | 100% |
| 1997 | 5,846           | 97.39% | 175             | 2.61% | 6,708 | 100% |
| 1996 | 4,483           | 96.6%  | 177             | 3.4%  | 4,660 | 100% |
| 1995 | 3,918           | 96.5%  | 142             | 3.5%  | 4,060 | 100% |

Source: Legal Aid Board *Annual Reports* 1995-2003

The Board's *Annual Report 2003* showed that a legal aid certificate (entitling the applicant to legal advice and representation) was granted to 4,460 persons in 2003.<sup>119</sup> Of these, 4,379 were family law cases, with only 81 certificates or 1.82% granted in non-family law cases.

In relation to the non-family proceedings undertaken by Law Centres in 2003, some 21 concerned judicial review, 10 were tort cases, 8 were landlord and tenant cases, 8 cases were on behalf of rape/sexual offences complainants under the Sex Offender's Act 2001 and there were 3 cases relating to debt and 3 relating to contract proceedings. There were 31 miscellaneous cases.<sup>120</sup> Although the total number of cases taken by the Legal Aid Board in 2003 had risen by 10% over the 1995 figure, the number of non-family cases had fallen by about 40% over the same period.

#### 2.5.2 Legal advice needs

As the Legal Aid Board is permitted to give legal advice, even in areas where it is not permitted to grant representation and legal aid, it is instructive to examine their statistics for 2003, being the most recent year for which statistics are available.<sup>121</sup> These can then be contrasted with information obtained from FLAC statistics for the same year.

**Table 2: Legal Aid Board legal advice statistics 2003**

| Subject Matter          | Total        | %           |
|-------------------------|--------------|-------------|
| Family Law              | 2,305        | 66%         |
| Conveyancing            | 478          | 14%         |
| Other Civil law matters | 721          | 20%         |
| <b>Total</b>            | <b>3,504</b> | <b>100%</b> |

Source: Legal Aid Annual Report 2003, p. 10

According to the Legal Aid Board, “the figures for family law and conveyancing can be combined to provide a total of 2,800, or about 80%, as conveyancing services arise only after the provision of legal services in family law matters.”<sup>122</sup> This leaves a residual category headed ‘Other civil law matters’ which comprises 20% in total of the cases in which legal advice was provided in 2003. This broad category is not broken down further in terms of subject matter. There is therefore no indication of the range of issues outside of family law and conveyancing on which the Board has provided advice. In addition, the total of 721 (20%) is low, given that it relates to 30 full-time and 12 occasional Law Centres throughout the country.

### 2.5.3 FLAC Centre and telephone information line enquiries

A comparison of the types of legal issues dealt with by FLAC in its legal information and advice service shows a divergence from the Legal Aid Scheme, where family law issues are predominant. In a sample using combined figures from two FLAC Legal Advice Centres in Cork City and Blanchardstown, Dublin 15, the issues which presented to FLAC for advice or referral was as follows:

Table 3: Breakdown of areas of advice given in FLAC Centres (representative sample) 2003

| Area                               | Blanchardstown | Cork City  | Combined total | %           |
|------------------------------------|----------------|------------|----------------|-------------|
| Family                             | 110            | 82         | 192            | 35%         |
| Employment                         | 17             | 47         | 64             | 12%         |
| Housing/Landlord & Tenant/Property | 39             | 38         | 77             | 14%         |
| Criminal                           | 11             | 19         | 30             | 5%          |
| Wills/Probate                      | 6              | 16         | 22             | 4%          |
| Consumer/Debt                      | 19             | 15         | 34             | 6%          |
| Immigration/Asylum                 | 52             | 5          | 57             | 10%         |
| Social Welfare                     | 3              | 3          | 6              | 1%          |
| Other <sup>123</sup>               | 19             | 49         | 68             | 13%         |
| <b>Totals</b>                      | <b>276</b>     | <b>274</b> | <b>550</b>     | <b>100%</b> |

Source: FLAC Annual Report 2003, pp. 7-8.

In the telephone information and referral line operated by FLAC, the statistics show a similar broad range of issues covered during the same year.

**Table 4: FLAC Telephone Information and Referral line 2003**

| Area                               | Totals      | %           |
|------------------------------------|-------------|-------------|
| Family                             | 2,194       | 38%         |
| Employment                         | 594         | 10%         |
| Housing/Landlord & Tenant/Property | 569         | 9%          |
| Criminal                           | 264         | 4%          |
| Wills/Probate                      | 290         | 5%          |
| Consumer/Debt                      | 198         | 3%          |
| Immigration/Asylum                 | 77          | 1%          |
| Social Welfare                     | 70          | 1%          |
| Legal Services <sup>124</sup>      | 420         | 7%          |
| Combined Other <sup>125</sup>      | 1334        | 22%         |
| <b>Overall total</b>               | <b>6010</b> | <b>100%</b> |

Source: FLAC Annual Report 2003, p. 5

In both the representative sample from the FLAC Centres and telephone information line, family law queries account for only slightly over one-third. The housing category accounted for approximately one query in ten. In contrast to the Legal Aid Board advice figures, FLAC queries are not primarily conveyancing enquiries, but largely cover matters such as tenants' rights and local authority housing issues. The remainder of the figures indicate a spread across a wide range of other civil law matters. Employment law accounts for at least 10% of all enquiries, indicating a considerable need for legal advice and information in this increasingly complex area. Other significant areas include consumer/debt, wills/probate, immigration, refugee and social welfare law as well as personal injuries and civil litigation.

The cumulative effect of these tables illustrates the narrow focus of the Legal Aid Board in terms of both legal representation and advice on the specific area of family law. The FLAC figures indicate that while family law continues to be a large category of advice queries, other areas of civil law constitute a significant percentage. FLAC's findings – that areas of unmet need are more diverse than an analysis of the Legal Aid Board's statistics would indicate – are reinforced by a recent study on unmet legal need in Ballymun in North Dublin, where one in every two legal problems related to housing rights or needs.<sup>126</sup> Many people had more than one legal problem. Other areas of major concern were family law (44%), social welfare problems (22%), domestic violence issues (16%) and debt (11%).<sup>127</sup> The strongest criticism of legal services was expressed in relation to the lack of availability of legal representation for people who are summoned to court for debt proceedings.<sup>128</sup>

## 2.6 Funding and Waiting Lists

The issue of waiting lists for legal services has been one of the most visible failures of the Irish civil legal aid scheme. During the scheme's 25 years of operation, there have been dramatic variations in the time for which an applicant has had to wait for a legal aid service.<sup>129</sup> Waiting lists have

sometimes exceeded two years. At other times, applicants have met their solicitors within a month. The length of the waiting time varies from one Law Centre to another. At times, waiting lists have been so long, and so unmanageable, that the Law Centres actually closed their lists.

Even within two months there can be substantial adjustments in waiting times for legal aid. On 31 March 2005, several of the Board's 30 Law Centres had waiting times of ten months or more, with four centres having a waiting time in excess of one year. By 31 May 2005, those waiting lists had reduced to the extent that only one centre remained with a waiting time in excess of six months.<sup>130</sup>

The Legal Aid Board has consistently attributed the increase in waiting times to budgetary constraints. In 2003, state funding for the provision of civil legal aid services was €18,389m.<sup>131</sup> According to the Chairperson of the Board, Anne Colley, this level of funding presented a challenge to the Board in seeking to maintain a reasonable level of service. She recognised that "the net effect of actions taken to operate within [the Board's] budgetary allocation has been to reduce the number of persons provided with legal services and has led to an increase in waiting times throughout the law centre network".<sup>132</sup>

These budgetary restrictions also affected the number of cases handled. The Board's Annual Report for 2003 showed that the total number of cases for which legal services were provided was 19,500, a reduction from 21,300 in 2002.<sup>133</sup>

Waiting times for an appointment with a solicitor under the civil legal aid scheme in December 2003 and in December 2004 are set out in the table below. At one end of the scale, an initial appointment was readily available at the Longford Law Centre. However, an applicant to certain Law Centres in Dublin, Cork or Portlaoise could have a waiting time of over a year. Other centres had maximum waiting times of just at or under a year. By December 2004, three Law Centres still had maximum waiting times of more than a year with Newbridge Law Centre clients potentially waiting for twenty months.

**Table 5: Waiting times for appointment with a Legal Aid Board solicitor at 31 December 2003 and 31 December 2004**

| Law Centre               | Waiting time in Months             |                                    |
|--------------------------|------------------------------------|------------------------------------|
|                          | At 31 December 2003 <sup>134</sup> | At 31 December 2004 <sup>135</sup> |
| Athlone, Co. Westmeath   | 1                                  | 2.75                               |
| Castlebar, Co. Mayo      | 2                                  | 4                                  |
| Cavan                    | 1                                  | 3.5                                |
| Pope's Quay, Cork        | 14                                 | 2                                  |
| South Mall, Cork         | 9                                  | 11                                 |
| Blanchardstown, Dublin   | 6                                  | 10.75                              |
| Clondalkin, Dublin       | 4                                  | 2.5                                |
| Finglas, Dublin          | 11                                 | 14.5                               |
| Gardiner St. Dublin      | 9                                  | 7.75                               |
| Brunswick St. Dublin     | 16                                 | 3.5                                |
| Ormond Quay, Dublin      | 6                                  | 3.25                               |
| Tallaght, Dublin         | 7                                  | 5.5                                |
| Dundalk, Co. Louth       | 5                                  | 4.5                                |
| Ennis, Co. Clare         | 12                                 | 9                                  |
| Galway                   | 10                                 | 3.75                               |
| Kilkenny                 | 11                                 | 6.75                               |
| Letterkenny, Co. Donegal | 8                                  | 7.5                                |
| Limerick                 | 4                                  | 3                                  |
| Longford                 | 0                                  | 0                                  |
| Monaghan                 | 5                                  | 3.5                                |
| Navan, Co. Meath         | 12                                 | 10                                 |
| Nenagh, Co. Tipperary    | 4                                  | 6                                  |
| Newbridge, Co. Kildare   | 8                                  | 20                                 |
| Portlaoise, Co. Laois    | 13                                 | 10                                 |
| Sligo                    | 5                                  | 2                                  |
| Tralee, Co. Kerry        | 6                                  | 3.75                               |
| Tullamore, Co. Offaly    | 2                                  | 2.75                               |
| Waterford                | 5                                  | 3                                  |
| Wexford                  | 4                                  | 5.75                               |
| Wicklow                  | 10                                 | 14.5                               |

Source: Legal Aid Board

By the end of February 2005, the waiting time at Newbridge was reduced to 17 months, but two months later, by April 2005, it had been cut to less than two months. Similarly, in Wicklow, where an applicant could wait for an appointment for almost 15 months in December 2004, the potential waiting time was still 14 months in February 2005. However by April 2005, the maximum waiting time in Wicklow was less than a month.

This reduction in maximum waiting times coincided with an injection of funds to the Legal Aid Board and a concerted campaign by the Board to reduce the size of the waiting lists. It also coincided with the High Court decision in *O'Donoghue v. The Legal Aid Board*.<sup>136</sup> In his judgment, Kelly J quoted from a letter by then Legal Aid Board CEO Mr Frank Goodman. Speaking about the prevailing situation in April 1997, Mr. Goodman stated:

A more fundamental problem in relation to staff arises, however, and this relates directly to the pressure of work and lack of resources. In many law centres, where there are extended waiting lists the staff are under pressure from applicants and third parties, including public representatives, acting on behalf of the applicants, who are continuously seeking explanations for the delay in the provision of the service. It is indeed a fact that the maintenance and management of extended waiting lists has become a block of work in its own right, which detracts from the ability of the staff to provide legal services.<sup>137</sup>

Kelly J also summarised the evidence given by Mr Frank Brady of the Legal Aid Board. He found that Mr Brady had stated in correspondence that because of the shortage of staff, solicitors were acting as their own secretaries, thus preventing them from doing solicitors' work; that solicitors were under such pressure that managing the list itself became a problem; and, thirdly, that even in emergency or priority cases where the Board had tried to deal with the situation by the introduction of a rota system, the Centres became overwhelmed and could not cope with the demand of the work.

Kelly J then addressed what might be considered a reasonable waiting period. He drew on the evidence given by Mr Brian Gallagher, a solicitor, that it would be proper practice for a solicitor to see a new family law client within one to two weeks of the client seeking the appointment initially.<sup>138</sup> He accepted that it is unrealistic to expect the Board to be in a position to match the speed of a solicitor in private practice in respect of cases which are not of particular urgency, in the light of the bureaucratic machinery which applies to the Legal Aid Board. However, the judge saw

[...] no reason to suggest that the Board's own target of two to four months is unreasonable. Thus, the plaintiff ought to have had a consultation with a solicitor within a period of about two to four months from the time that she first made contact with the Board.<sup>139</sup>

In a press release in November 2004, the Chairperson of the Legal Aid Board welcomed an increase in funding for 2005 of almost €3m from €18.389m to €21.362m. She stated that this would

[...] enable the Board to fill all existing solicitor vacancies, together with the immediate restoration of legal aid certificates for divorce and judicial separation cases in the Circuit Court, and for domestic violence and other family law cases under the Private Practitioner Scheme in the District Court. The funding will also enable the Board to establish a new scheme to engage private practitioners in divorce and judicial separation cases in the Circuit Court in 2005...[T]he net effect of this increase in funding will be that the Board will now have the capacity to provide a timely services to assist those whose circumstances would otherwise prevent them having access to the justice system. <sup>140</sup>

## Conclusions

The current approach to providing civil legal aid is not based on an assessment of legal needs. Indeed, in a system where more than 80% of legal advice and 95% of court representation relates to family law, it is difficult to see how any needs-based approach has been used in the planning of services. Securing equal access to justice for those with legal needs, including unmet legal needs, should be the driving principle behind a legal aid scheme. Instead, the Legal Aid Board looks to what it can do within the remit of the Civil Legal Aid Act 1995 and, within the finances allocated to it, prioritises family law and child care over any other type of law.

Statistics in this chapter show that there is a significant demand for assistance in the areas of debt, employment, housing and social welfare law. Plainly, the needs of many people on low incomes in terms of legal aid are not being met by the current civil legal aid scheme. Certain categories of law are specifically excluded by the legislation, some of which, such as housing law, may impact particularly heavily on low income families. The legislation itself directs the Board to provide an individually-focused, non-contentious service by excluding test cases or the kind of group actions which might be a tool to vindicate rights. There seems to be no particular reason to exclude test cases, which often clarify law and which were eligible for legal aid until 1995 under the pre-statutory scheme.

Excluding these areas also fails to take advantage of the resources of the Board and its Law Centres. More than many other legal professionals, the staff of Law Centres and personnel within the Board have built up a body of knowledge and experience on the needs of low income families and communities. They are often well placed to identify issues which should be tested to establish rights; their experience can help them to identify where the law needs reform so as to improve the lives of marginalised communities and individuals. As it stands, the Board interprets its legal mandate as one which prohibits them using that knowledge in test case litigation, in community or public legal education or in submissions for law reform.

While test cases of themselves remain excluded by law, the Legal Aid Board has in the past contributed to the development of law, particularly family law, in cases which have effectively tested legislation. To protect its clients' needs, the Board needs to actively encourage its staff to identify and challenge areas of law where clients suffer injustice. There should be a focus within the Board on policy and research. Given the specific expertise of the staff, this would assist in advancing legal knowledge and education, and would inform the Board itself and Government as to how legal aid services could best be utilised to ensure equal access to justice for all. Turning its back on such an approach, however, the research unit which did once exist within the Legal Aid Board has been disbanded.<sup>141</sup>

Over and above those prescribed by law, some exclusions result from the actual administration of the civil legal aid system. Although there is no requirement in the legislation to concentrate more than 95% of legal aid work on family law matters, this is what happens in practice. The overwhelming focus on family law has, inevitably, led to the exclusion of other vital areas of work. In 2004, at a time when the Board recognised that there was a need for legal assistance for non-national parents of Irish children who were applying for leave to remain in Ireland, the Board refused to take on the provision of legal services to assist them, citing insufficient resources and long waiting lists. While budgetary constraints and waiting lists undoubtedly existed, it was also true that the bulk of available resources went into family law. This focus has led to a widespread perception that the Board operates a purely family law service.

The Board's almost total concentration on family law, an area which is non-contentious with regard to state administrative procedures, policies and law misrepresents the wide spectrum of actual legal need of those who are obstructed from access to justice because of low incomes.

The current scope and administration of the Act clearly focuses on individual casework. By contrast, an approach focusing on access to justice will aim to ensure that a person's legal needs are met, even where a person is ignorant of the need. The State's duty is to promote, as well as to respect and protect the right of every person to access justice. It is for this reason that an approach based on the needs of individuals and communities will include provision for legal education and law reform.<sup>142</sup> This is potentially important for those who have little or no access to political or other influence and who may already be marginalised. Access to legal services becomes a crucial element in full participation in the State, in decisions that affect one's own life and in ensuring respect for individual and group rights. Poor implementation of access to legal services which can guarantee these opportunities may increase exclusion, and certainly will not promote social inclusion.

As Kelly J said in *O'Donoghue v Legal Aid Board*, when he found that Ms O'Donoghue's constitutional right to legal aid had been breached:

The purpose of the 1995 Act is that persons who meet the necessary criteria shall receive legal aid. That carries the implication that the entitlement to legal aid will be effective and of meaning.<sup>143</sup>

On examination of the scope of the civil legal aid scheme, in law and in practice, the right to legal aid is not vindicated and the legal aid scheme fails to be effective or meaningful to many who need the service.

## Notes

<sup>87</sup> Legal Aid Board (2003) *Corporate Plan 2003-2005* p. 5.

<sup>88</sup> Civil Legal Aid Act 1995, Section 5(1).

<sup>89</sup> Section 25.

<sup>90</sup> Section 26(4).

<sup>91</sup> Section 27.

<sup>92</sup> *Sunday Tribune*, 19 December 2004.

<sup>93</sup> FLAC Data Collection Programme for the year 2004. The question asked was: "Have you ever heard about the Legal Aid Board?" 48.3% of respondents said that they had heard about it.

<sup>94</sup> Under Section 28(9)(b), legal aid may be granted for defamation actions which arise by way of counter-claim. However, in light of the ECtHR's decision in the case of *Steel & Morris v The United Kingdom*, the blanket exclusion of all other defamation cases from the scope of the legal aid scheme is incompatible with the right to legal aid guaranteed as part of the right to a fair hearing.

<sup>95</sup> There is an exception under Section 28(9)(c)(v) of the Act "[...] in respect of licensing matters, provided that the Board is satisfied that the granting of the licence the subject matter of the dispute would cause hardship to the applicant."

<sup>96</sup> There are exceptions to the general rule under Section 28(9)(c) of the Act:

(i) in respect of proceedings under the Landlord and Tenant Acts, 1967 to 1994 (in so far as they relate to residential property), the Married Women's Status Act 1957, the Rent Restrictions Acts 1960 and 1967, the Family Home Protection Act 1976, the Family Law Act 1981, or proceedings arising out of a dispute between spouses as to the title to or possession of any property;

(ii) in respect of proceedings arising out of a dispute as to the title to or possession of any property—

I) between two persons as respects whom an agreement to marry one another is in force or who are living together as man and wife but are not married to each other, or

II) between two persons as respects whom an agreement to marry one another has been terminated or who, having lived together as man and wife without being married to each other, have ceased to live together as man and wife, where either or both of them had title to or possession of the property at a time when the agreement to marry was in force or, as the case may be, they were living together as man and wife;

(iii) where a subject matter of the dispute is the applicant's home (or what would be the applicant's home but for the dispute) and the Board considers that the applicant—

suffers from an infirmity of mind or body due to old age or to other circumstances, or

may have been subjected to duress, undue influence or fraud in the matter, and that a refusal to grant legal aid would cause hardship to the applicant;

(iv) in connection with the preparation of an assent, if the Board is satisfied that the assent relates to the applicant's home and where—

I) a grant of representation has been taken out on behalf of the applicant, or

II) the applicant had taken out a personal grant of representation, and that a refusal to grant legal aid would cause hardship to the applicant;

(v) see immediately preceding footnote for exception at Section(9)(c)(v);

(vi) in respect of a conveyancing matter connected to a matter in which legal aid or advice has already been granted.

<sup>97</sup> However, Section 28(8)(d) states: "An application for a legal aid certificate shall not be refused by reason only of the fact that a successful outcome to the proceedings for the applicant would benefit persons other than the applicant." Whyte (2002, p. 299) points out that these provisions "again underline the State's understanding of legal aid as being primarily about the servicing of individual cases rather than about achieving social reform."

<sup>98</sup> This would appear to exclude class actions which are now regarded as an effective use of legal resources to obtain a remedy for a wide group of people with similar claims. See Law Reform Commission (2003) for a further discussion of multi-party litigation in Ireland.

<sup>99</sup> Section 28 (9)(c)(iii).

<sup>100</sup> *Dublin Corporation v Hamilton* [1998] 2 ILRM 542.

<sup>101</sup> *Byrne v Judge James Scally & Dublin Corporation* [2000] IEHC 72 (12 October 2000).

<sup>102</sup> *Ibid.*, para. 41.

<sup>103</sup> In proceedings for possession under Section 62 of the Housing Act 1966, where a mandatory order is given in certain circumstances, there is no entitlement to legal aid for tenants, ex-tenants and unauthorised occupants. There is a limited protection in that a hearing must take place before a judge in order to make the order for possession (*Kerry County Council v. McCarthy*, [1997] 2 ILRM 481), but the requirement of entitlement to a fair and public hearing without effective representation can hardly be met in this instance. Clearly, Articles 6 and 8 of the ECHR will be activated at such a determination of civil rights and it is difficult

to see how the current position of some unrepresented people being evicted from State property which they regard as their home could satisfy the obligations under the ECHR Act 2003. The Supreme Court in *Dublin City Council v. Fennell* [2005] IESC 33 (12 May 2005), a case that mainly involved the retrospective application of the European Convention of Human Rights Act 2003, stated that “important questions remain to be resolved” in relation to the hearing of evidence in such cases.

<sup>104</sup> *Dublin City Council v. Fennell*, see note 103 above.

<sup>105</sup> Kenna, Dr.P. “*The Implications for Local Authorities of the ECHR Act 2003*”. Paper delivered to a conference on the European Convention on Human Rights Act 2003 Review and Human Rights in Committed Relationships. Law Society, Dublin. 16 October 2004. See website <http://www.lawsociety.ie> (last viewed 12 July 2005).

<sup>106</sup> The 1998 *Agreement Reached in the Multi-Party Negotiations*, Strand 3 - Rights, Safeguards and Equality of Opportunity, para. 9. states: “The Irish Government will also take steps to further strengthen the protection of human rights in its jurisdiction. The Government will, taking account of the work of the All-Party Oireachtas Committee on the Constitution and the Report of the Constitution Review Group, bring forward measures to strengthen and underpin the constitutional protection of human rights. These proposals will draw on the European Convention on Human Rights and other international legal instruments in the field of human rights and the question of the incorporation of the ECHR will be further examined in this context. The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland.”

<sup>107</sup> Legal Services Commission (2000) *Funding Code*.

<sup>108</sup> *Ibid.*, p. 27.

<sup>109</sup> *Ibid.*, p. 37.

<sup>110</sup> Civil Legal Aid (Refugee Legal Service) Order 1999 S.I. No.74 of 1999 and Civil Legal Aid (Refugee Legal Service) (No.2) Order 1999 S.I. No. 262 of 1999.

<sup>111</sup> In *Corcoran v. Minister for Social Welfare* [1992] ILRM 133, Murphy J held that there was no constitutional right to legal aid to persons appearing before administrative tribunals.

<sup>112</sup> Leggatt (2001) *A Tribunal For Users – One System, One Service. Report of the Review of Tribunals*.

<sup>113</sup> *Ibid.*, p. 150, in relation to Immigration Appeals Tribunals.

<sup>114</sup> Law Society Committee on Civil Legal Aid (1991) *Report on Civil Legal Aid*, para. 17.

<sup>115</sup> Department of Enterprise, Trade and Employment (January 2002) *Employment Appeals Tribunal. Explanatory booklet*, para. 12.

<sup>116</sup> As amended by the Equality Act 2004.

<sup>117</sup> See the cases of *Kavanagh v. Legal Aid Board* [2001] IEHC 149 (24th October, 2001) and *O'Donoghue v. Legal Aid Board*, see note 25 above.

<sup>118</sup> The Refugee Legal Service is excluded from these figures here since it is a contracted service. The RLS is a separate service which provides legal aid to asylum seekers. It is funded by the Department of Justice, Equality and Law Reform through the Legal Aid Board and is described as the Asylum Seekers Task Force – Legal Aid. However, access to legal aid and advice for immigrants is an issue which has not been widely examined in relation to access to legal services in Ireland.

<sup>119</sup> Legal Aid Board (2004) *Annual Report 2003*, p. 52.

<sup>120</sup> This totals 84 cases, so there is a minor discrepancy within the statistics on pages 52 and 53 of the Legal Aid Board's *Annual Report 2003*.

<sup>121</sup> When this report went to print (13 July 2005), the Annual Report for 2004 for the Legal Aid Board was not yet published so that data for 2004 could not be examined.

<sup>122</sup> Legal Aid Board (2004) *Annual Report 2003*, p. 10.

<sup>123</sup> ‘Other’ includes areas such as personal injuries & civil litigation (at 9% of Cork queries), solicitor/client issues, Garda complaints and contract.

<sup>124</sup> Refers to queries about the location of FLAC Centres countrywide.

<sup>125</sup> ‘Other’ includes areas such as tort, contract, legal aid enquiries and client/solicitor issues.

<sup>126</sup> Gogan (2002) *Unmet Legal Need in Ballymun*.

<sup>127</sup> *Ibid.*, p. 6.

<sup>128</sup> See FLAC (2003) Report: *An End Based on Means?*

<sup>129</sup> Under the original scheme set up in 1980, waiting times proved so controversial as to almost undermine the credibility of the whole initiative. Four prominent members of the Legal Aid Board resigned after the first decade of the scheme because of their stated dissatisfaction with the capacity of the Board to perform its functions in a satisfactory manner, due to the lack of adequate funding. (See *Irish Times*, “Funding row with Minister – Legal Aid chiefs resign”, 7 January 1990.)

<sup>130</sup> Figures supplied by the Legal Aid Board to FLAC.

<sup>131</sup> Legal Aid Board (2004) *Annual Report 2003*, p. 44.

<sup>132</sup> *Ibid.*, p. 2.

<sup>133</sup> Legal Aid Board (2004) *Annual Report 2003*, p. 2.

<sup>134</sup> Figures from Legal Aid Board (2004) *Annual Report 2003*, p. 15.

<sup>135</sup> Figures provided by the Legal Aid Board, January 2005.

<sup>136</sup> *O'Donoghue v. The Legal Aid Board, The Minister for Justice, Equality and Law Reform & Others*, see note 25 above.

<sup>137</sup> *Ibid.*, pp. 19-20.

<sup>138</sup> *Ibid.*, p. 48

<sup>139</sup> *Ibid.*, p. 48.

<sup>140</sup> Legal Aid Board press release, 22 November 2004.

<sup>141</sup> A pilot project by which the Legal Aid Board established a Research and Policy Unit in 2001-2002 was not renewed at the end of a year's operation.

<sup>142</sup> See Northern Ireland Legal Services Commission. (July 2004) *Legal Need in Northern Ireland: Literature Review*, p. ix.

<sup>143</sup> *O'Donoghue v. Legal Aid Board*, p.44.



## Chapter 3

# Eligibility for Civil Legal Aid: The merits and means

### 3.1 Introduction

The last chapter examined the extent of the legal aid scheme and found that there are substantial gaps in coverage leading to a slighter service than is possible, and which is insufficient to allow people to vindicate their right of access to justice.. This chapter now looks at who may access that service, and what it might cost.

Entitlement to civil legal aid and advice depends on satisfying a merits test and a means test. The merits test is based on reasonableness, as assessed by the Legal Aid Board and, in most cases, on the chances of winning the case. It does not take the client's need for legal service as a first priority which restricts its ability to deliver access to justice.

The eligibility criteria for legal aid and advice are set out in the Civil Legal Aid Act 1995 and the Civil Legal Aid Regulations 1996 and 2002.<sup>144</sup> Tests imposed of merits and means should serve to improve the constitutionally recognised right of equality before the law. They should not be barriers which prevent or obstruct a client with limited resources from accessing justice. In reality, the financial calculations have proved to be an obstruction. Indeed the system is so flawed that even the most financially stretched may end up paying the full cost of the service that they receive. This is particularly troubling in circumstances where the initial means test is framed so that only those living on very limited resources can access the scheme at all.

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### 3.2 Merits test

Section 24 of the Act provides as follows:

Without prejudice to the other provisions of this Act a person shall not be granted legal aid or advice unless, in the opinion of the Board—

- (a) a reasonably prudent person, whose means were such that the cost of seeking such services at his or her own expense, while representing a financial obstacle to him or her would not be such as to impose undue hardship upon him or her, would be likely to seek such services in such circumstances at his or her own expense, and
- (b) a solicitor or barrister acting reasonably would be likely to advise him or her to obtain such services at his or her own expense.

This two-fold test of merit eligibility is not straightforward. The applicant may find it very difficult to know whether he or she will qualify. On the one hand, the test involves assessing whether a reasonable person would bring the case if they had the funds to do so and, on the other, whether a reasonable lawyer would advise such an action. This assessment is made by the Board itself, which is entitled under the legislation to form an opinion in relation to the two criteria. This reflects a restrictive policy underlying the statute and set down by the Oireachtas as to who should receive civil legal aid.

A further test of merit is imposed by Section 28 of the Act, which stipulates:

- 28 (2) Subject to sections 24 and 29 and the other provisions of this section and to regulations (if any) made under section 37, the Board shall grant a legal aid certificate under this section to a person if, in the opinion of the Board—
- [...]
- (b) the applicant has as a matter of law reasonable grounds for instituting, defending, or, as may be the case, being a party to, the proceedings the subject matter of the application,
  - (c) the applicant is reasonably likely to be successful in the proceedings, assuming that the facts put forward by him or her in relation to the proceedings are proved before the court or tribunal concerned,
  - (d) the proceedings the subject matter of the application are the most satisfactory means (having regard to all the circumstances of the case, including the probable cost to the applicant) by which the result sought by the applicant or a more satisfactory one, may be achieved, and
  - (e) having regard to all the circumstances of the case (including the probable cost to the Board, measured against the likely benefit to the applicant) it is reasonable to grant it.
- (3) Where the proceedings the subject matter of the application under this section concern the welfare of (including the custody of or access to) a child, paragraphs (c) and (e) of subsection (2) shall not apply.

Thus the assessment of the merits of a person's case is complex, with provisions stretching over a number of sections in the Act. An exception is child welfare cases, where the Board does not have to carry out its own judgment as to whether a case may succeed or not. In all other cases, Section 28 requires the Board to find, as a matter of law, that the applicant has reasonable grounds for instituting, defending or, as the case may be, being a party to the proceedings. The applicant must also be reasonably likely to succeed.

In *GD v St Louise Adoption Society*,<sup>145</sup> the court addressed the interpretation of a successful litigant. Budd J held that in proceedings relating to the welfare, custody and upbringing of a child, a person will be regarded as a successful litigant even when unsuccessful in obtaining the court orders sought. It is sufficient that their participation in the proceedings makes a worthwhile contribution in assisting the court to determine the issues in dispute.

There are no available statistics on the number of cases refused on the grounds of merit. In theory, almost every case must be determined on its merits. In practice however, the principal concern in family law cases is whether the applicant satisfies the means test. In all other areas of law, more extensive information has to be supplied by a Law Centre before a decision is made by the Board on the merits of a case.<sup>146</sup> The Legal Aid Board does not publish examples of the kind of case refused on merits nor are there any published statistics about the number of non-family law cases assessed or refused on this basis. While there is an internal appeal to the Appeals Committee, the Board is not amenable to inspection by the Office the Ombudsman and therefore no independent scrutiny is available from that office. The result is that there is no guidance available to those who might seek legal aid or to the public at large on the opinion of the Board and the justifications for refusal of cases on their merits.

### 3.3 Means test

An applicant must also satisfy certain financial criteria before the Legal Aid Board will grant legal services.<sup>147</sup> Financial eligibility is assessed by reference to the applicant's disposable income and, in some cases, disposable capital.<sup>148</sup> Part 5 of the Civil Legal Aid Regulations 1996 and 2002 stipulate the rules in this respect.<sup>149</sup>

The Board may reassess an applicant's resources while the person is receiving legal aid.<sup>150</sup> In addition, individuals who are on a waiting list for legal aid for 12 months or more are reassessed on their means by the Board and this may affect their entitlement.

Section 29 of the Act provides:

- [...] (1) [A] person shall not qualify for legal aid or advice unless he or she—
- (a) satisfies the requirements in respect of financial eligibility specified in this section, and in regulations under section 37, and
  - (b) pays to the Board a contribution towards the cost of providing the legal aid or advice determined in accordance with regulations under section 37.
- (2) The Board may, in accordance with regulations under section 37, provide legal aid or advice to an applicant without reference to his or her financial resources and may waive any contribution payable pursuant to this section and to any other regulations under section 37 or may accept a lower contribution.
- (3) An applicant's financial eligibility shall be assessed by reference to the applicant's disposable income and, where appropriate, disposable capital and the contribution payable by the applicant pursuant to subsection (1)(b) shall be assessed by reference to the applicant's disposable income and, where appropriate, disposable capital, as prescribed by the Minister by regulations under section 37.
- (4) Subject to subsection (2), an applicant whose disposable income exceeds the amount prescribed by the Minister by regulations under section 37 shall not be eligible to obtain legal aid or advice.
- (5) Subject to subsection (2), an applicant whose disposable capital exceeds the amount prescribed by the Minister by regulations under section 37 shall not be eligible to obtain legal aid or advice.

A person who is:

- applying for relief under the Hague Convention relating to child abduction;<sup>151</sup> or
- a rape complainant who may be questioned on her sexual history<sup>152</sup>

is entitled to legal aid without undergoing a means test. In all other circumstances, an assessment of means takes place before legal aid or advice is given.

The current financial eligibility limits, set by Regulation in 1996, have been reassessed only once, in February 2002. No provision has ever been made to index link allowances or income or otherwise to provide for increases in the cost of living or in the cost of legal services.

### 3.3.1 Income assessment

Under the rules, a person must have a disposable income of less than €13,000, allowing for certain deductions in respect of income tax, P.R.S.I., dependants, rent/mortgage repayments and childcare expenses.<sup>153</sup>

Income for the purposes of financial eligibility includes:

- Salary, wages, pension or annuity;
- Income from trade, business or gainful employment, including monies from stocks, shares, deposits and other investments;
- Rents from property;
- Benefit, allowances or pensions under the Social Welfare Acts, Health Acts or the Redundancy Payments Acts;
- Value of other benefits or privileges, including free or partially free board.<sup>154</sup>
- Income of one's spouse or partner, unless the partners are separating or have competing interests or where it would be entirely unreasonable to include it (as would be the case in many family law proceedings).<sup>155</sup>

This definition of income is widely drawn. It includes income from Community Employment Schemes and all social welfare payments. Child benefit is not included. The first €20 per week of payments by a child (a person under eighteen or, if over eighteen, pursuing full time education) to the household is discounted (totalling €1,040 per annum). Any payment made by a child to the household over that amount is counted as the applicant's income.

There are significant differences between the categories of allowable expenses in the 1996 and 2002 Regulations. Under the Regulations, disposable income is calculated by taking an applicant's income and deducting amounts described as allowances. These allowances were revised in 2002. While there was an increase in some allowances, other categories were abolished. This has had a major impact on eligibility criteria, since such outgoings can form a significant part of expenditure of low income applicants. The reduction in the number of allowances has, in many cases, more than cancelled out the minor increase in allowances.

The allowances, as they were in 1996, are set out below.<sup>156</sup>

**Table 6: Allowances under the 1996 Regulations**

| Category                                                                  | Maximum amount |
|---------------------------------------------------------------------------|----------------|
| (a) applicant's spouse                                                    | €1,686.21      |
| (b) each dependent child                                                  | € 848.19       |
| (c) rent                                                                  | €3,778.74      |
| (d) rates actually paid by the applicant                                  | full amount    |
| (e) payments by unmarried applicant to parents towards household expenses | €1,594.79      |
| (f) mortgage repayments                                                   | €4,827.54      |
| (g) expenses incurred in travelling to and from work                      | € 336.48       |
| (h) hire purchase payments                                                | € 336.48       |
| (i) loan interest payments (other than f and h)                           | € 764.38       |
| (j) social insurance contributions                                        | full amount    |
| (k) payments towards life insurance or VHI Scheme                         | € 957.38       |
| (l) income tax payments                                                   | full amount    |
| (m) board and lodgings (up to 50%)                                        | €2,030.31      |
| (n) child care expenses                                                   | € 848.19       |

Source: Civil Legal Aid Regulations 1996

As a result of the change of regulation in February 2002, a more restrictive set of allowances is used to calculate disposable income for the purposes of eligibility, as follows:

**Table 7: Allowances under the 2002 Regulations**

| Category                           | Maximum amount |
|------------------------------------|----------------|
| (a) Spouse                         | €1,900         |
| (b) Each Dependant                 | €1,100         |
| (c) Accommodation costs            | €4,900         |
| (d) Income tax                     | full           |
| (e) Social insurance contributions | full           |
| (f) Childcare per child            | €1,100         |

Source: Civil Legal Aid Regulations 2002

Significantly, for people on low incomes in particular, the following allowances from the 1996 Regulations no longer apply:

- Expenses incurred in travelling to and from work;
- Hire Purchase payments;
- Loan interest payments;
- Payments towards life insurance, including mortgage protection insurance;
- VHI health insurance.

A married or cohabiting couple who are separating or who have opposing interests are permitted a set of allowances each. Otherwise, the income of the couple is aggregated, with just one set of allowances taken into account to calculate an applicant's disposable income. A child (i.e. someone under 18 years old) seeking legal aid is assessed on his or her parents' income, unless the child's interests oppose those of the parent.

The accommodation allowance, capped at €4,900 since 2002, (and in relation to a mortgage, increased by less than €100 since 1996) allows approximately €400 per month to be discounted for the purposes of the means test, whether the applicant has a mortgage or is in rented accommodation. Clearly, this is far below the cost of an average monthly mortgage or private rented accommodation. The cost of mortgage protection insurance is not an allowable deduction in the means test.

The failure to factor in Hire Purchase and loan interest repayments creates additional difficulties for those who may already be at significant economic disadvantage; a substantial proportion of whose income may go to service credit repayments. Many potential applicants for legal aid will now live far from their place of work and this will involve sizeable travel expenses. The revised means test also fails to take this into account.

The exclusion of private health insurance for those of already modest means is at odds with state practice where taxpayers can set off health insurance against tax.

The biggest increase in the allowances was in regard to childcare, which went from €848 per family in the 1996 Regulations to €1,100 per child in 2002. Even this increase fails to take account of the spiralling cost of childcare.

By excluding certain allowances from 2002 onwards, and by failing to increase the other allowances (particularly accommodation costs), state policy has contributed to reducing access to legal aid for applicants on modest incomes and their families. It has also failed to recognise the reality of consumer credit in contemporary Irish society.

### 3.3.2 Capital assessment

In addition to providing details of income, an applicant for legal aid whose capital resources exceed €3,200 must complete a statement of means (capital) form. Those whose disposable capital resources, as assessed by the Board, exceed €320,000 will not be entitled to civil legal aid.<sup>157</sup>

The Regulations provide that 'capital' means the value of every resource of a capital nature, including money, stocks, interests in a company, house property, interest in land, life insurance policies, valuables, debts owed to the applicant, or any other equipment of a capital nature, including a car.<sup>158</sup> Details must be provided of all money held in hand, in trust, money lodged, deposited or invested in a bank, building society, credit union or other institution.

From this statement of means, the Board will calculate the applicant's 'disposable capital'. Disposable capital refers to the net worth of the capital having taken into account the loans and

costs associated with it.<sup>159</sup> There are different calculation methods, depending on whether the property is the family home of the applicant, is farmland or is other real property.

The monetary value of the family home of a married couple is disregarded in the calculation of capital if it is the subject of dispute.<sup>160</sup> Almost always, the family home will be the subject of dispute in family law proceedings. In all other cases, a person's family home will only be included in a capital assessment if the unencumbered value (which is the market value less any mortgage) exceeds €190,500. The applicant must give details of the value of the family home and its contents, the outstanding mortgage, the monthly repayment and the name of the lending institution. The value of the mortgage/loan outstanding on it is deducted to get the disposable capital value of the home. The applicant's share in the home is calculated to give a net value which is reckoned to be the applicant's capital share.

Farm land is treated differently to other property. All capital assessments in respect of farm land must be referred to Legal Aid Board Head Office having obtained certain information from the applicant. The Law Centre must obtain the acreage, the market value, the outstanding mortgage/charge with appropriate documentary evidence, details in relation to stock and plant/machinery, the value of any farm buildings and details of any lease agreement.

Other land is calculated at its full market value. The applicant must give details of the acreage and current market value of the land and details of any outstanding mortgage or charge attached to the land. In the Regulations, no discount is allowed for situations where a person is the legal owner of a share in property but has no control over the income or profits from it.

Disposable capital, subject to certain provisos, also includes

- Stocks, shares and other securities;
- Interest in a company, business or property owning body;
- Life Insurance/Endowment Policies;
- Debts owed to the applicant;
- Valuables (other than personal items of jewellery);
- Other capital resources, such as a car, boat, mobile home, etc.;
- Capital repayments on foot of a loan.

### 3.3.3 Contributions

Civil legal aid is not free. All clients are expected to pay a contribution. By contrast, criminal legal aid, if granted, is free. In 2003, the Legal Aid Board received over €1.25 million euro from its clients. It collected €383,046 in contributions based on clients' income and capital, with €22,000 still collectable at the year end. In addition, it collected €904, 790 by way of fees from costs awarded to its clients and from money obtained by its clients in court or through the settlement of actions.<sup>161</sup>

Contributions required by law from those who receive legal aid and advice fall into three categories:

- Income contributions;
- Capital contributions;
- Contributions from costs and damages recovered.

An applicant for legal aid whose sole income is social welfare benefits or allowances will pay €6 as a contribution for legal advice and €35 as a contribution for legal aid.<sup>162</sup> The maximum allowance for other applicants is calculated by a formula set out in the Regulations. This is further discussed below. In addition, since 2004, recipients of legal services may also have to pay a range of legal expenses. Clients are now required to pay to have documents sworn before Commissioners for Oaths, for valuations and advertisements. They also have to contribute to the cost of medical reports, even where this involves issues of child welfare.

Contributions are normally payable in advance of the service being provided. The Board has a statutory duty to ensure that contributions are collected. If it is necessary to take proceedings to recover contributions, then the Regulations require the Board to do so. They also anticipate that it may be necessary for the applicant to borrow to fund the contribution payable. Regulation 21(5) of the Civil Legal Aid Regulations 1996 and 2002 provides that:

The contributions payable by an applicant will normally be paid in advance of legal services. Exceptionally, however, contributions may, at the discretion of the Board, be paid by instalments over a period not exceeding twelve months from the date of acceptance of the offer of legal aid or advice but this method of payment shall apply only if the Board is satisfied that the applicant cannot obtain credit elsewhere, or that it would cause hardship, or would be unreasonable in all the circumstances, to require payment in advance.

There is provision in the Civil Legal Aid Act 1995 to waive a contribution:

The Board may, in accordance with regulations, under Section 27, provide legal aid or advice to an applicant without reference to his or her financial resources and may waive any contribution payable pursuant to this section or to any regulations under section 27 or may accept a lower contribution.<sup>163</sup>

However the corresponding Regulation is less generous:

In the case of an applicant whose maximum income contribution is assessed at €35, the Board may either waive the contribution or accept a lower contribution if it considers that it would cause that person severe hardship to pay the maximum contribution. This provision shall apply also where an applicant is required to pay both an income and a capital contribution, and the total amount payable is €75.<sup>164</sup>

It is not clear what an applicant would have to show in order to demonstrate hardship and there is no public information on how often, if at all, waivers are granted on the grounds of “severe hardship”. Applications for such a waiver are decided by the head office of the Legal Aid Board in Cahirciveen. While there is provision for internal appeal, there is no appeal outside of the Board or to the Ombudsman’s office. In the interests of fair procedures, and permitting people to know what case they are obliged to address, the decision making process and the criteria for deciding what constitutes severe hardship should be made public.

### **Income contributions**

#### *Contributions for legal advice*<sup>165</sup>

Under the Civil Legal Aid Regulations 1996 and 2002, the minimum contribution payable for legal advice is €6. This amount applies where a person’s disposable income does not exceed €8,300 per annum. Where the disposable income is between €8,300 and €13,000 per annum, the maximum contribution payable is one-tenth of the difference between disposable income and €8,300, subject to a minimum contribution of €6 and a maximum of €100.

In effect, this means that an applicant for legal advice with a disposable income of no more than €9,300 will pay the maximum contribution of €100 unless the Board rules that the actual cost of providing the service is less. The provision for a scale of disposable income between €9,300 and €13,000 in the context of giving legal advice is in fact meaningless.

#### *Contributions for legal aid*<sup>166</sup>

Under the Regulations, there is a €35 minimum contribution for legal aid for those with a disposable income under €8,300. Those with a disposable income between €8,300 and the upper limit of €13,000 must also pay €35 plus one-quarter of the difference between the disposable income and €8,300.<sup>167</sup> In effect, this means that a person with a disposable income at the upper income limit may pay a contribution of as much as €1,210 based on income alone. There may also be a contribution charged against the client’s capital.

As is the case with legal advice,<sup>168</sup> the Board is permitted to charge only that part of the assessed contribution which it actually expects to spend on the provision of the legal aid. There is no external appeal against the assessment, nor is there any published document which details how a client's income contribution may be assessed. The result is that a legal aid applicant is subject to a discretionary, subjective assessment of the payment required of them with a maximum income contribution which is high, even by commercial standards.

Even the amount initially assessed may be increased. If a payment below the maximum is initially required from a client, the Board may demand a further contribution if it finds that the applicant's resources have increased during a case or if it decides that the actual costs of providing the service were higher than initially assessed. On the other hand, if the sum paid as a contribution exceeds the actual cost of the service, there is provision for a refund to the person who paid. There is no evidence from the accounts of the Legal Aid Board as published in their Annual Reports that they have ever refunded any money to clients. Nor is there any information in their general leaflets that such a refund may be possible. Even if no occasion has arisen where a refund should be made, it is important that clients are made aware of the statutory duty of the Board to make such a repayment in appropriate cases.

### **Capital contributions**

A capital contribution is payable only for legal aid. This contribution is assessed on disposable capital over €3,200 and is payable in addition to the income contribution. Capital contributions are calculated in different ways, depending on the assets involved.

Where a married couple's family home is the subject of dispute between them, it is excluded from the calculation.<sup>169</sup> Otherwise in relation to the family home, there is no capital contribution payable where the equity is €190,500 or less.<sup>170</sup> Where the equity exceeds €190,000 but is less than €250,000 the contribution is capped so that it may not exceed the income contribution payable. Where the equity is more than €250,000 the capital contribution is set at 1% of the excess over €190,500.<sup>171</sup> These capital contributions impact particularly heavily on those with limited incomes who may have paid off their mortgage. For instance, an applicant for legal aid with a property worth €280,000 and a disposable income of €13,000 is liable to pay a maximum contribution of €2,105 for representation by a Law Centre in any court proceedings, in any court, on any matter.

### **Recovery of Costs and Damages**

There is no limit to the amount that may be recovered from costs and damages. Under these provisions, a client may pay the Legal Aid Board the entire cost of the legal service provided, at standard Legal Aid Board rates. This is not what applicants for legal aid expect and these provisions are not widely known or advertised.

'Damages' are the compensation monies awarded by a court or paid on settlement to a person for injury suffered in the past, or to be suffered in the future. 'Costs' refers to the legal fees and expenses which are incurred in the course of litigation. Usually, if a person wins a court case, most or all of the person's costs, including legal fees, are paid by the other party to the case. However, the losing party will usually be responsible not only for their own legal costs and expenses, but also those of the person who wins the case. The usual arrangement in family law is otherwise. In family law cases the usual arrangement is that each involved in the proceedings (each party) is responsible for his or her own legal costs and expenses.

Where legal costs and expenses are awarded to one person against another, they are called "party and party costs". When awarded, both damages and costs are the property of the client. In addition to the sum awarded by a court or on settlement, a solicitor may, by prior arrangement, charge a client for legal fees and expenses which are not fully covered by the court award or which it would

be unreasonable to ask the other side to pay. This charge is called generally the 'solicitor and client costs'. If there is a dispute on costs, the bill can be referred to an official of the High Court or Circuit Court who will judge the correct amount of costs. These are then said to be 'taxed'.<sup>172</sup>

The Civil Legal Aid Act 1995 provides that the relationship between a solicitor or barrister and a person in receipt of legal aid or advice is the same as the lawyer-client relationship in private practice.<sup>173</sup> Under the legislation, the Legal Aid Board is obliged to seek its costs where appropriate and may also charge solicitor and client costs to a legally aided person. The amount which it may recover is either the amount that the Board itself assesses as the actual costs of the case<sup>174</sup> or the sum assessed by the court or determined by the court's Taxing Master.

#### *Recovery of costs from the other party*

Section 33(2) of the Act stipulates that

[A] court or tribunal shall make an order for costs in a matter in which any of the parties is in receipt of legal aid in like manner and to the like effect as the court or tribunal would otherwise make if no party was in receipt of legal aid and all parties had respectively obtained the services of a solicitor or barrister, as appropriate, at their own expense.

The legislation provides that the Legal Aid Board must be involved in the settlement of any action where its solicitor represents a party.<sup>175</sup> This avoids a situation where it might be confronted with a settlement reached between the parties outside of the courts which denied the Board the opportunity to collect all or part of its costs.

#### *Recovery of costs from legally aided persons*

Section 33(7) allows the Board to recover its costs from monies or property (subject to certain exclusions outlined below) awarded by a court to a legally aided person. It states that, subject to certain exceptions,

any general damages or any money (including costs) or other property recovered by or preserved for a person in receipt of legal aid or advice in a matter, or on his or her behalf, by the Board, whether by order of any court or tribunal or by virtue of any settlement reached to avoid or bring an end to any proceedings or otherwise, shall, in the case of general damages or money be paid by the person or the Board into the Fund and in the case of other property be made by the person or the Board subject to an appropriate charge in favour of the Fund for the purpose of the recovery by the Board of its costs in providing such legal aid or advice.

There are some exceptions to the rule permitting payment to the Board from its client's damages.<sup>176</sup> One is that the Board may not seek to recover costs from the normal residence of a legally aided person. However, this only applies if the legally aided person remains entitled to remain in the residence, and can afford to do so. Therefore the Legal Aid Board would not force the sale of a client's residence just to pay its costs. However, it is quite common in family law cases, and may happen in other cases that the family home must be sold, to provide accommodation for both spouses after separation or divorce, or to otherwise implement a court judgment or a settlement. In that case, the Board will take payment of their costs from the proceeds of sale. Other awards of damages from which the Board will not take costs are:

- Periodical or lump sum maintenance payment;
- The first €3,571.35<sup>177</sup> of arrears of maintenance;
- The first €3,571.35 of awards under a number of legislative provisions, such as the Social Welfare Acts and the Unfair Dismissals Acts.<sup>178</sup>

The Board has discretion to waive its entitlement to costs where payment of the money would cause hardship. The circumstances which would give rise to hardship are not publicised, nor are there guidelines publicly available on what factors will be taken into account. As with other Legal Aid Board decisions, there is no provision for external appeal, and the decision is not open to scrutiny by the Ombudsman.

In Appendix 1 of the Legal Aid Board's Annual Report for 2003, the Board lists total costs recovered in 2003 at €904,790.<sup>179</sup> In respect of these costs, the Report notes:

The Board may recover the costs of providing legal services from:

- a) the other party to a dispute, either as a result of a court order or as part of an agreement to settle a dispute or
- b) from the legally aided person, out of moneys/property received by the person as a result of the provision of legal services.

There is no breakdown in the accounts between amounts awarded as costs against the other party and those paid from damages or awards made to legally aided persons.

#### *Costs awarded against a legally aided person*

Under Section 36 of the Act, the Legal Aid Board is not liable to pay costs awarded by a court to a non-legally aided litigant against a person in receipt of legal aid. However, if a legally aided person takes proceedings but loses, and an award of costs is made against him or her, the successful litigant may present the bill for those proceedings to the Board. Even though it has no legal responsibility for them, the Board may make an *ex gratia* or discretionary payment towards such costs for such amount as it considers appropriate. The conditions that the Board will apply are that:

- a) the proceedings were instituted by the unsuccessful legally-aided litigant;
- b) the successful litigant has taken all reasonable steps to recover his or her costs from the unsuccessful litigant in person;
- c) the successful litigant will suffer severe financial hardship unless an *ex gratia* payment is made;
- d) the *ex gratia* payment will not exceed the amount that would be allowed if costs were taxed on a party and party basis;
- e) the case has been finally determined.<sup>180</sup>

By virtue of these conditions, it is clear that the Legal Aid Board will not consider making any payment until the successful litigant has taken extensive steps to recover costs directly from its legally aided client. The successful litigant must "take all reasonable steps" to recover costs directly. The actual result of this provision is that litigants are encouraged to pursue someone for costs whom the Legal Aid Board know, from their own means test records, had insufficient means to access justice on his or her own in the first place. In circumstances such as arose in the *GD v St. Louise Adoption Society* case, where even the losing party may be considered a "successful litigant", a legally aided person who was vindicated in the proceedings may also be pursued for costs.<sup>181</sup> There is no flexibility for hardship cases in this section of the Act.

### 3.4 Failure to obtain legal aid

Legal aid may be refused or withdrawn in certain circumstances. A person may appeal internally to the Board against such a decision.

#### 3.4.1 Refusal of legal aid or advice applications

A person may fail to qualify under the financial eligibility criteria or the Board may decide that the case is not one which merits legal aid. In addition, the Board has discretion to refuse to grant a legal aid certificate in the following circumstances:<sup>182</sup>

- where it is of the opinion that the applicant may obtain the cost of the proceedings, the subject matter of the application from, or be provided with legal representation by, a body or association of which he or she is a member, or any other source;
- where the applicant has on a previous occasion obtained legal aid or advice in respect of another matter and has, without reasonable explanation, failed to comply with the terms on which such legal aid or advice was granted;

- where the costs of representation would be less than the contribution payable by him or her;
- where the applicant has not provided such information as is reasonably required;
- where for reasons of acts, omissions or neglect of the applicant, the Board cannot comply with regulations made under the Act.

### 3.4.2 Termination of legal aid

A legal aid certificate may also be withdrawn. The Civil Legal Aid Act 1995 provides that the Board may revoke a certificate where it considers that it is “no longer reasonable” for the person to continue to receive legal aid.<sup>183</sup> This is interpreted in Civil Legal Aid Regulations 4(6) and 13(5). Where the behaviour of a legally aided client is likely to increase the cost of providing legal aid and advice unnecessarily, the Board may “revoke or terminate” the certificate. If, in the opinion of the Board, a client is behaving unreasonably or is more than 21 days in arrears in contributions payable to the Board, legal aid or advice may be withdrawn.

## 3.5 Appeal procedure

A decision of any official of the Legal Aid Board may be appealed under an internal procedure. The appeal must be in writing and the applicant’s solicitor must express a view on the decision appealed.<sup>184</sup> The first review is by the person who made the original decision. If the person remains aggrieved following this review, they may make a further appeal to the Appeal Committee. This is a statutory committee of Board members. According to the Legal Aid Board Annual Report 2003, this committee

meets each month (as required) to consider appeals by legal aid applicants to have decisions, made by authorised members of staff to refuse legal services in particular cases, reversed. Under Regulation 12(5) a committee may affirm, reverse or otherwise alter such decisions.

While responsibility for deciding on applications for legal aid is delegated to authorised members of staff, the Regulations also provide for a certifying committee of Board members to make such decisions. There were no meetings of a certifying committee in 2003.<sup>185</sup>

The result of any appeal will be notified in writing to the applicant and reasons will be given.<sup>186</sup> No details of appeals upheld or refused or of decisions altered are published by the Legal Aid Board.

The Legal Aid Board is involved in many significant decisions affecting a person’s rights and welfare. Currently, apart from the expensive and often impractical solution of High Court judicial review, the only remedy open to a person aggrieved by a decision of the Board is to appeal it to the Board. This is not consistent with the right of every person to fair procedures, which extends to the right to have relevant information, documents and matters which may be used in evidence.<sup>187</sup>

### 3.5.1 The Ombudsman

Until the Office of the Ombudsman was founded, the only possible challenge to administrative decisions of statutory bodies was through court action. Even then, not all administrative decisions were amenable to review by the Courts.<sup>188</sup> The Ombudsman’s Office was set up specifically to examine complaints from members of the public who believe that they have been unfairly treated in their dealings with public bodies.

The Ombudsman’s Office has extensive powers in law. It can demand any information, document or file from a body complained of and can require any official to give information about a complaint. It can look into all administrative actions including decisions, refusal or failure to take action, or administrative procedures.<sup>189</sup> Many public bodies are subject to scrutiny by the office – including all government departments, local authorities, An Post and the Health Service Executive. It is intended to add other statutory bodies, but so far, there has been no proposal by government or the Legal Aid Board to add that public body to the list of organisations amenable to inspection.

In the absence of such scrutiny, and in the absence of an independent and transparent appeal system, the Legal Aid Board's appeal system offends against the legal principle that not only must justice be done, but must be seen to be done.

## Conclusions

The purpose of legal aid, as described in the Civil Legal Aid Act, is to make it available to those of "insufficient means".<sup>190</sup> In that structure, it is inevitable that criteria and standards will be put in place to identify those who are eligible. It is clear from the examination in this chapter that the criteria adopted do not accomplish what was intended. They do not facilitate access to justice for those who are of insufficient means.

Even before legal aid is granted, intending applicants are faced with a complex process which requires them to prove that they are deserving of legal aid. There are a number of criteria to establish whether applicants "merit" legal aid. These are listed in Sections 24, 26 and 28 of the Act. There is no criterion that civil legal aid should be available to a person who needs it in order to access justice. Yet the right to legal aid is based squarely on that need. There is no evidence either that the need of the client is taken into account in internal decisions of the Legal Aid Board. Indeed there is little or no information available on how the merits of a case are assessed or how many files are examined on merits grounds.

The financial eligibility requirements are unduly harsh. Where clients qualify, then the level of their contribution is uncertain. Some will even find that the service that they receive is not subsidised at all by the State, but that they pay the entire cost. The level of information provided by the Legal Aid Board is minimal. It correctly states that the law centre staff will advise a person of the actual contribution in each individual case, but fails to point out that this contribution could be as high as the fee that the client would pay a private solicitor following negotiation.

What is so unfair about the system is how it is likely to impact most heavily on those who are living in the greatest poverty. Hire Purchase and loan repayments may often form a substantial part of the spending of low income applicants, but these payments are entirely ignored when financial eligibility for legal aid is being assessed. While recognised as an allowance which people of modest means needed to claim in the 1996 regulations, it was removed entirely in 2002.

Though far from generous, the current calculations and means test and contributions calculation favour one group of applicants over all others. Married or cohabiting couples may claim the right to keep their incomes separate for assessment purposes. They may also split the value of capital assets such as the family home and they may each claim a set of allowances. This enshrines an in-built bias in the system towards family law representation. Applicants from low income households, where two partners may be working and who may have childcare costs, rental or mortgage payments, are less likely to pass the means test and are more likely to have more substantial fees to pay for any service that they receive. This feeds the ongoing growth of family law as the area of speciality of the Law Centres, but fails to recognise the wider requirements of access to justice.

The Legal Aid Board has the power to exercise its discretion at many levels. It decides whether applicants are reasonable in seeking legal services and whether they are likely to win their cases. It decides when services may be withdrawn and whether an applicant's fee should be waived on grounds of severe hardship. Decisions of the Legal Aid Board about all of these issues normally will be final. In line with its obligations under Irish constitutional law and under the European Convention on Human Rights the Legal Aid Board's decisions and decision-making processes should be open, fair, timely and impartial.

In circumstances where appeals are internal, and there is no published information on decisions made on appeal, the process cannot be considered as an open one. In the absence of an open process, it is hard to judge whether the process is fair or timely. Based on the legal principle that no one should be a judge in his or her own cause, the impartiality of the decision-making processes cannot accord with good practice either. The logical step for the Legal Aid Board to take would be to submit to the scrutiny of the Ombudsman and it should recommend this to the Government without delay.

## Notes

- <sup>144</sup> Civil Legal Aid Regulations 1996 and 2002 (S.I. No. 273 of 1996 and SI No. 8 of 2002).
- <sup>145</sup> *G.D. v St Louise Adoption Society* [1997] IFLR 46. This case related to ex gratia payments towards the costs of successful litigants under the non-statutory scheme which preceded the Civil Legal Aid Act 1995.
- <sup>146</sup> Legal Aid Board Consolidated Circular 1/2000, Part 4.
- <sup>147</sup> Section 28(2)(a) Civil Legal Aid Act 1995.
- <sup>148</sup> The means test does not apply to the applicant in child abduction proceedings or in legal representation pursuant to the Sex Offenders Act 2001.
- <sup>149</sup> Civil Legal Aid Regulations 1996 and 2002 (S.I. No. 273 of 1996 and S.I. No. 8 of 2002)
- <sup>150</sup> Regulation 14(7), Civil Legal Aid Regulations 1996 & 2002.
- <sup>151</sup> Civil Legal Aid Act 1995 Section 28(5) relating to the *Hague Convention on the Civil Aspects of International Child Abduction*.
- <sup>152</sup> Civil Legal Aid Act 1995 Section 28(5A) as inserted by Section 35(3) of the Sex Offenders Act 2001.
- <sup>153</sup> Regulation 13 of Civil Legal Aid Regulations 1996 and 2002.
- <sup>154</sup> Regulation 15.
- <sup>155</sup> Regulation 14(4).
- <sup>156</sup> It is interesting that although these allowances were substantially altered in 2002, the Legal Aid Board financial assessment form on its website still describes permitted allowances as they were in 1996. See <http://www.legalaidboard.ie> (last viewed 12 July 2005).
- <sup>157</sup> Regulation 13(4) Civil Legal Aid Regulations, 1996 and 2002.
- <sup>158</sup> *Ibid* Regulation 18.
- <sup>159</sup> *Ibid* Regulations 18-20.
- <sup>160</sup> *Ibid* Regulation 14(3).
- <sup>161</sup> Legal Aid Board (2003), p. 41.
- <sup>162</sup> Regulation 21(10) Civil Legal Aid Regulations, 1996 and 2002.
- <sup>163</sup> Section 29(2) Civil Legal Aid Act 1995.
- <sup>164</sup> Regulation 21(9) Civil Legal Aid Regulations, 1996 and 2002.
- <sup>165</sup> See Civil Legal Aid Act 1995 Section 25 and Section 2.2 of this report for a definition of “legal advice”.
- <sup>166</sup> See Civil Legal Aid Act 1995 Section 27 and Section 2.2 of this report for a definition of “legal aid”.
- <sup>167</sup> Regulation 17 Civil Legal Aid Regulations, 1996 and 2002.
- <sup>168</sup> *Ibid* Regulation 21(3).
- <sup>169</sup> *Ibid* Regulation 14(3).
- <sup>170</sup> Equity is the residual value of a property when the value of the mortgage and any liabilities is deducted from its market value.
- <sup>171</sup> Regulation 20(9) Civil Legal Aid Regulations 1996 and 2002.
- <sup>172</sup> A description of taxation of costs, and a definition of party and party costs, and solicitor and client costs is contained in an information booklet, “The Role of the Taxing Masters of the High and Supreme Court” issued by the Courts Service (November 1999). See website <http://www.courts.ie>. (Last viewed 12 July 2005).
- <sup>173</sup> Section 32(1) Civil Legal Aid Act 1996.
- <sup>174</sup> In measuring the actual costs of a case, Section 34 of the Act provides that the following factors will be taken into account: a) the time devoted to the case and the salaries, fees and other expenses of the staff and of legal personnel; b) administrative expenses, including stationery, accommodation, photocopying and telephone; c) report fees; d) witness expenses; and e) court fees.
- <sup>175</sup> Section 33(5) Civil Legal Aid Act 1996.
- <sup>176</sup> *Ibid* Section 33(8).
- <sup>177</sup> This is the Euro equivalent of £2,500, the amount stated in the Act.
- <sup>178</sup> The Board would only be providing representation under these Acts before the courts in appeal cases, as otherwise legal aid is not available in tribunals which hear original claims under these Acts.
- <sup>179</sup> Legal Aid Board (2004) *Annual Report 2003*, p. 41.
- <sup>180</sup> Section 36(2)(a) to (e) Civil Legal Aid Act 1996.
- <sup>181</sup> *G.D. v St Louise Adoption Society*; see note 145 above.
- <sup>182</sup> Section 28(4)(a) to (e) Civil Legal Aid Act 1996.
- <sup>183</sup> *Ibid.*, Section 28(7).
- <sup>184</sup> Regulation 12 Civil Legal Aid Regulations 1996 and 2002.
- <sup>185</sup> Legal Aid Board (2004) *Annual Report 2003*, p. 7.
- <sup>186</sup> Legal Aid Board (2000) *Consolidated Circular*, Part 9.
- <sup>187</sup> ‘Asylum tribunal must disclose findings’ by Mary Carolan in *Irish Times*, 8 July 2005 on the judgment of MacMenamin J in judicial review proceedings against the Refugee Appeals Tribunal.
- <sup>188</sup> See Hogan G. & Gwynn Morgan D. (1998) *Administrative Law In Ireland*, 3rd Edn.
- <sup>189</sup> See *Frequently Asked Questions on* <http://www.ombudsman.gov.ie> (last viewed 12 July 2005).
- <sup>190</sup> The long title to the Civil Legal Aid Act 1995 is “An Act to make provision for the grant by the State of legal aid and advice to persons of insufficient means in civil cases”.

## Chapter 4

# How Civil Legal Aid is Delivered

### 4.1 Introduction

The European Union has situated the right of access to justice as a key element of social inclusion and the eradication of poverty. A decision of the European Council at Lisbon in 2000 agreed on the need to make a decisive impact on the eradication of poverty by 2010.<sup>191</sup> As part of this decision, Member States prepared National Action Plans (NAPs/incl) which the EU Commission examined in 2001 and again in 2003.<sup>192</sup> In its 2001 report, the Commission drew links between combating social exclusion, implementing rights and access to justice. In examining the issue of justice as presented in the National Action Plans, the Commission Report stated:

Perhaps surprisingly given the emphasis in the Nice objectives on access to rights, the issue of access to the law and justice only features in a few NAPs/incl (Germany, Italy, France and Netherlands). However, it is also implicitly included in a number of other NAPs/incl, such as Belgium, Finland, Greece and Ireland, in the context of equal status and non-discrimination measures. In addition to an absence of clear objectives and targets, there is a general lack of information and data in relation to the access that people living in poverty and social exclusion have to the law.

Access to law and justice is a fundamental right. Where necessary citizens must be able to obtain the expert legal assistance they require in order to obtain their rights. The law is thus a critical means of enforcing people's fundamental rights. For some vulnerable groups access to the law can be particularly important but also problematic. Groups identified in the NAPs/incl include ethnic minorities, immigrants, asylum seekers, victims of domestic violence, ex-offenders, prostitutes and low income people living in rented housing.<sup>193</sup>

In its 2003 examination, the Commission noted that the problem of access to legal services and justice, especially for certain vulnerable groups, was very widely recognised and that most Member States, including Ireland, featured measures to promote access to justice in their Plans.<sup>194</sup> It continued to stress the importance of developing, for the benefit of people at risk of exclusion, services and accompanying measures which would allow them effective access to justice and other public services.<sup>195</sup>

The analysis by the EU Commission recognises the link between access to justice, fundamental rights and social inclusion and goes further, in recognising that some groups find it difficult to access their rights.<sup>196</sup> This independent assessment therefore further emphasises that the right of access to justice must encompass whatever measures are needed to ensure effective access to justice for everyone.

Where individuals have rights, there must be mechanisms to enforce them, including legal mechanisms. However, access to justice is about more than just an individual's right of representation in court. It must also involve access to law-makers and decision-makers. People must be aware of their rights and understand the duties that such rights entail. A legal aid service that focuses almost exclusively on legal representation in individual cases cannot achieve this. Alternative and complementary approaches to delivering legal aid services must be explored.

This chapter briefly examines the governance of the Legal Aid Board and then addresses how the current mechanism for delivering legal services could be improved or transformed to address unmet need, particularly for low income or marginalised communities. It shows how the alternative approach of delivering law through community law mechanisms, which permits vulnerable

communities to access law, will also help to achieve the goal of social inclusion envisaged by Ireland's National Action Plans and by the European Union.

#### 4.2 Governance of the Legal Aid Board

The Legal Aid Board is a statutory body, the members of which are appointed and may be removed by the Minister for Justice, Equality and Law Reform.<sup>197</sup> In appointing persons to be members of the governing Board of Directors, the Minister must have regard to the desirability of their having knowledge or experience of the law, of the practice and procedure of the Courts, of business, finance, management and administration, consumer or social affairs or of any other subject which the Minister holds to be of assistance to the Board in the performance of its functions.<sup>198</sup>

There is no requirement for members of the Board to have knowledge or experience of the delivery of legal aid services or community development. The criteria for appointment in many ways mirror the restrictive function of the Board set out in Section 5(1) of the Act whereby the Board is obliged to provide legal aid and advice to persons who satisfy the Act's requirements within the resources allocated to it.

The Minister may at any time remove a member of the Board from office whose removal appears to the Minister to be necessary for the effective performance by the Board of its functions.<sup>199</sup> Members of the Board hold and vacate office upon such terms as the Minister, with the consent of the Minister for Finance, may determine.<sup>200</sup>

Like other State services, the Board's administration and management conform to the rules in the Code of Practice for the Governance of State Bodies issued by the Department of Finance.<sup>201</sup> The Board operates a Corporate Plan<sup>202</sup> in line with New Public Management principles – applying business management techniques and practices to the public sector. In line with these principles, the Legal Aid Board sets out its mission as the provision of “a professional, efficient and cost effective legal aid service”.<sup>203</sup>

Following decentralisation, the Board's head office is located in Cahirciveen, Co. Kerry while the senior management operates from its Dublin base. The Chief Executive, the Director of Legal Aid and the Assistant Director of Legal Aid are dual location positions between Kerry and Dublin.

Legal services are provided in the main through 89 solicitors<sup>204</sup> operating a network of Law Centres around the country. Ministerial control is maintained over the size of the Board's staff under Section 11(1) of the Act. The Minister for Justice, Equality and Law Reform must approve the number of staff and the Minister for Finance must consent to their appointment. The Minister also determines the location and establishment of Law Centres under Section 30(1) of the Act.

The difficulties with this level of ministerial control were well illustrated in the course of evidence in *O'Donoghue v. Legal Aid Board*. In his judgment, Kelly J referred to the extensive correspondence, seeking extra funding and staff, between the Board and the Department of Equality and Law Reform (as it was then) which had been revealed in the course of the action. When these requests were eventually acknowledged, the Department accepted the Board's need for extra resources, but the Minister for Finance, whose sanction was required, considered that “no matter how socially desirable it may be... the entire Government policy on the control of public service numbers would be eroded” by such a move.<sup>205</sup> The approach taken was purely a budget balancing one, not one based on the need of vulnerable people in need of legal services to access justice.

The Legal Aid Board may choose to obtain services by contract, rather than by employing staff.<sup>206</sup> The terms and conditions under which the Board can retain these independent contractors are also determined by the Minister for Justice, Equality and Law Reform, with the consent of the Minister for Finance. Section 30(3) of the Act empowers the Board to use panels of solicitors in private practice to provide services. However, the Board must seek the approval of both the Minister for Justice, Equality and Law Reform and the Minister for Finance in relation to the terms and conditions under which panels of private practitioners are established.

### 4.3 Concerns regarding the current scheme

It is apparent that the delivery of civil legal aid operates to a standard public service model, where a centralised authority decides on the allocation of staff, money and other resources and provides a service in whatever manner it deems appropriate. Thus the Board reports to the Minister for Justice, Equality and Law Reform who, in turn, reports to the Oireachtas. The entire service depends upon funding from the Department of Finance. This is in contrast with private practice, where the client and the solicitor agree on the service to be provided and the solicitor is directly accountable to the client. Under current state provision, the provider (the Legal Aid Board) is not accountable to the client. It only has to answer to its funder, which is central government.

The primary focus in Law Centres is on family law and on individual clients. Thus the Board interprets its mandate narrowly and does not engage in legal education and training or law reform. It does not engage in dissemination of information on legal entitlements, research or innovation into how best to meet the changing need for legal services of vulnerable people in society.<sup>207</sup> In the current system, the success of the legal service is judged by the throughput of cases. Thus when resources provided to the Law Centres are cut, the number of cases falls, resulting in what the Chairperson of the Board termed "a more limited service".<sup>208</sup>

The scheme has been supplemented from time to time by the use of private law practitioners. This was designed to improve access to legal aid services in situations where a Law Centre was not able to provide a timely service.<sup>209</sup> Following the introduction of the scheme on a pilot basis in 1993, it has operated only intermittently since then. When in operation, it has dealt with cases involving domestic violence and family law matters. However, in 2003, the entire scheme ceased, because of funding constraints. It was re-instated for District Court cases by early 2005. On 4 April 2005, the Board recommenced the Circuit Court Private Practitioner Scheme, on an ad hoc basis, targeting centres with the longest waiting lists. It appears that the reduction in waiting times for appointments seen in April 2005 is concurrent with the re-introduction of the Circuit Court scheme, and the transfer of cases by the Board to private practitioners. While it is clear that the use of private practitioners is a necessary supplement to the work done by the Legal Aid Board solicitors, it should not take major crises in service or litigation to use the private practitioner scheme in an efficient way which guarantees a quality service to clients.

However, the use of private practitioners is not a substitute for fully staffed Law Centres. The Law Centre is the initial point of contact for many people who cannot afford to access justice. It should be as well known as a source of legal representation as Health Centres are known as a source of medical assistance. It must have enough staff to realistically serve the numbers who are eligible to receive legal aid. The service it provides should be one where it actually carries out the full scope of legal aid and advice to which people are entitled as of right. It must be available to people at times and in places that are accessible to them. This will inevitably mean an expansion of Law Centres, either in number or in size. It will also entail the development of emergency out-of-office services and outreach to vulnerable groups in their own communities.

Given the resources that they have available to them, the solicitors and staff of the Legal Aid Board and its Law Centres do a remarkable job. The entire service, supplying civil legal aid across almost every county in Ireland employs less solicitors than several Dublin law firms and considerably less solicitors than are employed directly by the State to represent Government departments. The dedication of solicitors and staff has often disguised the fact that the resources supplied for civil legal aid are miniscule.

The Legal Aid Board has drawn up a Customer Service Action Plan which encourages staff to “seek feedback from clients and pass this feedback to the Customer Liaison Officer.”<sup>210</sup> There is a Customer Charter and Complaints Procedure.<sup>211</sup> A Customer Panel, drawn from various interest groups who made submissions to its corporate plan, meets four times a year.<sup>212</sup> However, this panel has no basis in statute or regulation and is limited in what it can discuss. Its potential to influence any change within the Legal Aid Scheme is unclear. It is confined to service delivery issues, which limits its wider impact on policy development.

Such a mechanism does not meet the need of a community to participate in the delivery to it of an essential public service. In fact, there is no obligation under the legislation to consult local communities as to the location or the type of legal services to be provided. Neither is there any representation on behalf of clients of legal aid services on the Board.<sup>213</sup> Thus there is a real concern that the direct experience of clients of the Legal Aid Scheme is not captured by the Board.

Law is an integral component of society, both shaping it and being shaped by it. Marginalised communities are more likely to see the law as a problem or obstacle than as a right or a tool for enforcing rights. Information and education about law is a powerful tool for social inclusion by familiarising people with the law, the legal system and its role in society. As a corollary, the failure to make the service one which actually addresses the needs of the community can exacerbate social exclusion.

Many of the problems of the civil legal aid system stem from the lack of involvement with the community that it is intended to serve. The current scheme of civil legal aid is not geared towards the community, but towards Government. An alternative approach that includes the community it seeks to serve will better identify and thus realise unmet legal need.

#### 4.4 Community Law Centres

The concept of Community Law Centres (CLCs), where practitioners use law as a mechanism for effecting social change and promoting social inclusion already exists. Seeking to tackle inequalities faced by the community and to campaign for law reform, they take a grassroots approach to service delivery and focus on issues pertinent to their communities' need.

There are already Community Law Centres in Ireland. In addition, such CLCs are well established as part of the system of delivering legal services in several jurisdictions, such as Canada and Australia.<sup>214</sup> A CLC will usually be based in a disadvantaged community and will provide legal services that reflect the issues affecting people living and working in the area. It will aim to make the law accessible by providing information on legal rights and entitlements and on how the legal system works. Issues affecting local people are discussed in local forums and this in turn leads to local campaigns on relevant issues such as housing, welfare or the environment.

Community Law Centres are particularly well suited to engage in policy and law reform work, as they are situated in the community campaigning for change. They engage in community legal education, the objective of which is to “enable people to understand and evaluate the significance of the law and the legal system as it affects them and to assist them to take appropriate action.”<sup>215</sup>

Although they may receive state funding, CLCs are run by their community, either through participating in its management or through volunteering and other activities such as fundraising. In this way, CLCs promote social inclusion.

CLCs may engage in strategic litigation and test cases, using targeted legal representation to achieve a result to benefit a community beyond the immediate client. This also “ensures that issues with significant wider public interest are brought to the court for determination.”<sup>216</sup> The general aim is to break down the social, cultural and psychological barriers which inhibit people from availing of legal services and thus accessing justice.

#### 4.4.1 Community Law Centres in Ireland

In Dublin, the Northside (formerly Coolock) and Ballymun Community Law Centres have been providing information, advice, representation and community education to local people since 1974 and 2002 respectively. By employing local knowledge, skill and expertise on their Management Committees, the CLCs are able to identify the subject areas most in need of legal services. The mandate of the centres generally includes the reduction of social exclusion by addressing specific legal issues within the local community.<sup>217</sup> The Centres may address issues needing reform and advocate for law reform. These CLCs do not take on work which is done by Legal Aid Board Law Centres. Clients of the CLC may be directed to a Law Centre where the case is within the remit of the Legal Aid Board.

Specialist Law Centres have been established more recently to address communities of interest, rather than geographical communities. Thus legal resources have been specifically allocated for people living with disability within the Disability Legal Resource, immigrants within the Immigrant Council of Ireland and travellers within the Irish Traveller movement. These also work on the areas of community need, providing information, advice, and community education where required.

In a useful sharing of resources between Ballymun CLC and the Legal Aid Board, the solicitor at Ballymun CLC is on secondment from his post as solicitor with the Board, though the CLC pays his salary. In addition, for a period, the Board arranged for one of its staff to work from the Ballymun CLC and to deal there with issues related to the Board’s Law Centre, such as establishing financial eligibility for the service. The service was withdrawn when the Board’s staff resources were particularly limited. However, this partnership approach, where the Board serves as a channel for funding and personnel to the CLC enables the CLC to address more effectively unmet legal need and may serve as a practical mechanism to accommodate both models of legal aid in the future.

#### Conclusions

Those who live in poverty are particularly vulnerable to the denial of their human rights by powerful authorities and by private individuals. Poor access to legal advice has meant that many people have suffered because they cannot enforce their legal rights effectively, or have even been unaware of their rights and responsibilities in the first place. Many socially excluded individuals and groups will at some point come into contact with the legal process, whether because of the condition of their housing, an inability to access essential services, or problems paying bills or for similar reasons.<sup>218</sup> They may perceive law, and the legal process only as a threat. They are also those who are least likely to have access to justice.

Access to justice is a matter of fact. It must be judged by the equal ability of all those who approach the law, or are affected by it to access it. The denial of the right of access to justice, and to equality before the law, particularly in civil matters, may not be as visible as the denial of other rights. Much

of the case law cited in this review concerns people who had common problems, but who believed they had to live with them. The situation of Josie Airey, still the landmark case on the right to civil legal aid, was one accepted as normal by many other spouses in her situation. Thus to vindicate the fundamental, individual human right of every person to be equal under the law and to access justice in an effective way, a number of approaches are needed.

Legal advice and advocacy for those experiencing poverty and social disadvantage is undoubtedly an effective engine of social inclusion. It also works towards the elimination of poverty through ensuring and expanding rights to benefits and services and by giving voice to grievances and empowering people and communities. Developing the rights of socially and economically excluded people benefits large numbers of people and facilitates equal access to justice for all. The key aim of the suggested reforms in civil legal aid is to ensure that the law is accessible to every person. A system where justice is meted out in direct proportion to one's wealth is abhorrent in a civilised society and is also wholly contrary to the rights protected by the Irish Constitution and in international human rights law.

The current system seriously undermines those rights of every person to be equal before the law, and to access justice. The service that exists must be properly resourced. It is unfair and – worse – unrealistic to expect such a small service to deliver legal aid representation and advice to everyone who needs it in order to access justice. Proper resourcing will help to meet the obligation of the State to respect every person's right of access to justice, to protect that right and to promote it.

The lack of community involvement in the running of individual centres has marked a significant failure in the scheme of civil legal aid since its inception. The pre-statutory administrative scheme, which operated from 1980 to 1995, had provision for community consultation, although there is no evidence that any such committees were ever formed. This was mirrored by a failure to make any provision for community representatives on the Legal Aid Board itself.<sup>219</sup> The failure to implement the limited discretion for community involvement may be a symptom of either the lack of a proactive approach or the lack of any real independent power of the Board with regard to innovative policy and actions.

The Legal Aid Board's aim, in practice, is to process as many individual cases as possible within set resources. The community approach, on the other hand, emphasises empowerment and enrichment of the community from which it derives its mandate. Community law approaches emphasise access to justice through legal education and outreach. They seek to overcome the gap between lawyer and client/community.

For twenty five years, the State has provided a legal aid service which has had as its aim the provision of legal aid to those of insufficient means. The way in which legal aid has been delivered over that time has been consistent. A public management approach has been taken where the State has delivered a service based on the amount of money that each passing budget deemed appropriate for legal aid. Given the harsh means test and the limited type of case work actually done, it is clear that the right of access to justice for all in civil matters has not been a priority for Government.

Successful civil legal aid must be built on the core principles of implementation of a fundamental human right, and delivery of a quality service to all of those who need it. Relying on these principles, FLAC's blueprint for legal aid is described in the next chapter. Firmly based in fundamental human rights, it identifies real actions that are necessary to achieve the goal of equal access to justice for all.

## Notes

<sup>191</sup> European Commission (2000) *Communication from the Commission to the Council, The European Parliament, the Economic and Social Committee and the Committee of the regions: Social Policy Agenda*.

<sup>192</sup> See further [http://europa.eu.int/comm/employment\\_social/social\\_inclusion/index\\_en.htm](http://europa.eu.int/comm/employment_social/social_inclusion/index_en.htm), (last viewed 15 May 2005).

<sup>193</sup> European Commission (2002) *Joint Report on Social Inclusion* p. 46.

<sup>194</sup> European Commission (2004) *Joint Report on Social Inclusion*, pp. 74-75.

<sup>195</sup> *Ibid.*, p. 53.

<sup>196</sup> From 2005, an annual *Joint Report on Social Protection and Social Inclusion* will be published. To feed into the preparation of this umbrella report, the Commission Services publish separate and more detailed reports focusing on the National Action Plans on Social Inclusion or on the Joint Inclusion Memoranda. States are expected to consult with their people in the preparation of their Plans.

<sup>197</sup> These members “hold and vacate office upon such terms and conditions as the Minister, with the consent of the Minister for Finance, may determine.” Civil Legal Aid Act 1995, Section 4(1).

<sup>198</sup> *Ibid* Section 4(3)(a).

<sup>199</sup> *Ibid* Section 4(4)(e).

<sup>200</sup> *Ibid* Section 4(1).

<sup>201</sup> For a discussion on the particular approaches to rights taken by the Irish State in the organisation of its public administration approaches and the Strategic Management Initiative see Cousins (1997) “The Quality of Public Services: Clarifying Conceptual Issues”

<sup>202</sup> Legal Aid Board (2003) *Corporate Plan 2003 – 2005*.

<sup>203</sup> *Ibid.*, p. 5.

<sup>204</sup> This excludes solicitors employed for the Refugee Legal Service.

<sup>205</sup> *O'Donoghue v. Legal Aid Board & ors.* see note 25.

<sup>206</sup> Civil Legal Aid Act 1995, Section 11(7)

<sup>207</sup> The Legal Aid Board *Customer Service Action Plan 2001-2004* at p. 5 states that “we provide the maximum information on our full range of services.” This does not deal with the dissemination of that information. Clearly it is not saying that the maximum information on the full range of rights for people in need of legal services is being provided.

<sup>208</sup> *Ibid.*, p. 2.

<sup>209</sup> Legal Aid Board (2004) *Annual Report 2003*, p. 16.

<sup>210</sup> Legal Aid Board (2001) *Customer Service Action Plan 2001-2004*, p. 5.

<sup>211</sup> See Legal Aid Board, Leaflet No. 10. *Customer Care and Complaints Procedure*.

<sup>212</sup> The current membership of the Customer Panel includes AIM Family Services, AMEN, The Bar Council, Family Mediation Service, Finglas Law Centre, FLAC, Health Services Executive, The Law Society of Ireland and Women's Aid.

<sup>213</sup> During the debate on the Civil Legal Aid Bill 1995, various Senators attempted to have places on the Board reserved for community representatives. However this was successfully opposed by the then Minister, Mervyn Taylor T.D., who did not want to extend the size of the Board, nor “to provide sinecures for any particular organisation”. See 1.42 Seanad Debates, c.1889 (6.4.1995). See also Whyte (2002) *Social Inclusion and the Legal System*, p. 295.

<sup>214</sup> The Federation of Community Legal Centres, Victoria, Australia (see <http://www.communitylaw.org.au/>, last viewed on 12 July 2005) and Community Law Centres in Ontario, Canada (<http://www.cleo.on.ca/english/links.htm#1> last viewed on 12 July 2005)

<sup>215</sup> Victoria Legal Aid (2000) *Annual Report 1999-2000*, p. 24.

<sup>216</sup> Legal Services Commission (2003) *Funding Code Guidance (Release 11)*, p.61.

<sup>217</sup> Hickey C. “The Role of the Community Law Centres in promoting Social Inclusion”. Paper delivered to a conference *Realising Rights: The First Eamon Leahy Memorial Conference. The challenge for Community-based Information and Legal Advice Centres in Promoting Social Inclusion in the Enlarged European Union. Conference Summary* 25 June 2004.

<sup>218</sup> UK Department for Constitutional Affairs & Law Centres Federation (2001) *Legal and Advice Services: A pathway out of social exclusion*.

<sup>219</sup> Whyte (2002) *Social Inclusion and the Legal System*, p. 290.



## Chapter 5

# Access to Justice: A Blueprint for Civil Legal Aid in Ireland

### 5.1 Introduction

This report sets out a blueprint of how a fair, equitable scheme to facilitate access to justice might be achieved. As in any guide, there are a number of elements. Some can be achieved immediately. Others will take time, involving, as they do legislative reform. All are based on the recognition that individuals have a right, and society has a need to ensure that everyone can access justice.

**1. Equal access to justice is a fundamental human right. The State and all of its organs should incorporate the recognition of this right into all aspects of its law, policy and practice.**

- Given that there is no express protection in the Irish constitution of the right of access to the courts and to legal aid, the Oireachtas should enact legislation codifying those rights.
- The State should ensure that there is sufficient provision for legal aid and advice to persons of insufficient means in civil cases.
- The Legal Aid Board should be subject to the scrutiny of the Office of the Ombudsman.
- The State should specifically include the objective of protecting and promoting the right of access to justice in its National Action Plans for Social Inclusion, commencing with the new National Action Plan being prepared in 2005.
- All relevant government Departments should commission independent audits and impact assessment studies to ensure that all legislation, regulations, procedures and policies comply with the State's human rights obligations and the requirements of constitutional and international human rights law.

**2. Those who have rights must have a meaningful method of enforcing them.**

- The Legal Aid Board should review the current operation of Law Centres as primarily a family law service. It should endeavour to ensure that its staff is fully conversant with the full statutory scope of the Board's services and it should publicise the extent of those services.
- Sufficient funds should be provided to allow the Board to employ sufficient staff to deliver effective civil legal aid and legal advice to persons of insufficient means.
- The State should provide resources to communities to establish community and specialist law centres which aim to promote the rights of the socially and economically excluded and to facilitate equal access to justice for all.
- The State and the Legal Aid Board should promote partnership between Community Law Centres (CLCs) and the Board, using as a template the existing partnership arrangement at Ballymun, Dublin CLC. The State should encourage and facilitate new and innovative

approaches to stable partnerships in the delivery of high quality legal services which meet the needs of the clients served.

- Section 28(9)(a) of the Civil Legal Aid Act 1995 which prohibits civil legal aid for designated areas of law should be repealed.

**3. While in a society with competing demands on resources legal aid will be a benefit based on need, the eligibility criteria must reflect the actual cost of living and the cost of legal services.**

- Pending a thorough review of the means test, the disposable income and capital limits and the amounts of all allowances should be immediately adjusted to realistic levels to take account of increases in the cost of living.
- Eligibility criteria should be reviewed annually.
- Allowances provided for in the Civil Legal Aid Regulations 1996 but removed in the Civil Legal Aid Regulations 2002 for Hire Purchase, loan interest payments, health insurance, life assurance and for travel to and from work should be reinstated at realistic levels. The cost of common household utilities should be recognised and an appropriate allowance should be made.
- The Civil Legal Aid Regulations 1996 and 2002 should be amended immediately so that the value of the family home is excluded from any calculation relating to the contribution that the applicant has to pay; and no contribution or costs should be deducted from the proceeds of sale of the family home towards the cost of delivering legal aid services.
- Every person should be assessed on his or her own income and assets only and in particular, the income and assets of spouses or co-habiting partners should not be aggregated in assessing the financial eligibility of one of them.
- The criteria for financial eligibility should be measured annually against national poverty proofing standards and the Department of Justice, Equality and Law Reform should publish the underlying analysis.
- The State should implement EU Directive 2003/8/EC to improve access to justice in cross-border disputes.
- Decisions to refuse or revoke legal aid should be in writing, with reasons furnished. There should be an independent appeals mechanism. The decisions of the Legal Aid Board should be subject to the scrutiny of the Office of the Ombudsman.
- The State should extend the list of cases that will automatically merit legal aid from the existing limited list of certain child custody cases and certain categories of rape complainant to include all of the family law work that the Board currently undertakes. No merits test should be required for such work.
- The State should enact amending legislation to ensure that legal aid is always available where required to vindicate human rights. There should be a system for assessing complex cases outside of normal financial and merit limits. This assessment should aim to vindicate rights, rather than just to alleviate hardship.

- The Legal Aid Board should publish detailed information, such as will allow an analysis of the underlying trends, on sums it receives by way of contributions from clients from litigation costs and from damages.
  - The Legal Aid Board should make its calculation of costs public and available to all clients.
  - The Legal Aid Board should publish the guidelines that it uses to assess hardship cases, or cases where conditions or contributions are waived
- 4. The requirement of access to justice is wider than access to the courts. In pursuance of protecting this right, and its duty to promote knowledge of rights, the State should commit resources to a programme of public and community legal education.**
- The Legal Aid Board should establish a dedicated service to assess how the law impacts on the communities that it serves. The information and analysis should be available to the Board, to inform it in its policies and to the Board's staff for use in its work. The analysis should be made available to the public.
  - The State should provide resources to allow interested groups to provide public and community legal education to improve knowledge of legal rights and entitlements.
  - The State should provide resources to communities to encourage legislative and policy advocacy and community group representation.
  - The Legal Aid Board should disseminate widely information about the Board's services.
- 5. Access to legal aid must be effective. To this end, the Legal Aid Board and the State must ensure that the system of legal aid actually delivers a meaningful service.**
- The scandal of waiting lists that rendered the scheme virtually meaningless many times in the past must not occur again. Waiting times should never exceed the Board's own goal of two to four months and the Board should take steps to ensure the normal waiting period is as short as possible.
  - The State must ensure that there is a secure source of funding available to the Legal Aid Board to carry out its mandate of delivering civil legal aid to persons of inadequate means.
  - The Legal Aid Board should monitor the management of waiting lists to ensure that at all times, the Board delivers a high quality, efficient service to the client.
  - The Legal Aid Board should ensure that its staff and agents are alert to any potential deficiencies or breaches of the constitutional or human right to access the courts and justice. The Board should have procedures in place and train its staff to recognise and report such deficiencies and to notify such deficiencies to the appropriate State departments.
  - The Legal Aid Board should provide information about its services effectively and consistently.
  - The Board should provide an emergency, out-of-hours service.
  - The Board should publish and disseminate widely a comprehensive statement on the circumstances and terms on which cross border legal aid is available.

- The Board should encourage the direct participation of its clients and of groups acting for marginalised or disadvantaged communities in the preparation of its plans and procedures and delivery of its services. The State should make statutory provision for participation by clients of the legal aid service, and of the communities most dependent on such legal services. Pending statutory amendment, the State should appoint representatives of communities which are heavily dependent on legal aid as members of the Legal Aid Board.
- The Board should make use of modern communications methods and technology to provide a more efficient and user friendly service. This should include use of the internet to allow an applicant to qualify on financial grounds on line.

## The way forward

While the right to civil legal aid is recognised in Ireland, there is still much to be done to realise that right. The current scheme of civil legal aid is narrowly focused, poorly resourced and excludes many who should be entitled. To be effective in the vindication of basic rights which are guaranteed in law, legal aid provision must be constructed from the perspective of those people and communities who need it to access justice.

FLAC presents this blueprint which, if implemented would deliver civil legal aid in a way which would respect and protect the human rights of those who are otherwise at risk of being denied access to justice. The elements of the blueprint are practical, possible, and are in line with Irish State obligations in national and international law.

The right of access to justice and to civil legal aid is often not recognised. Organisations and communities concerned with human rights must be vigilant to ensure that the right is protected and promoted. We include amongst these the Irish government, the Legal Aid Board and non-governmental organisations which work in the community and to advance human rights.

FLAC, a human rights organisation which is dedicated to the realisation of equal access to justice for all, will work in conjunction with all other interested parties to make the blueprint a reality.

# Constitution and Table of Statutes

Constitution of Ireland 1937

## Table of statutes

### Irish statutes

Child Abduction and Enforcement of Custody Orders Act 1991

Civil Legal Aid Act 1995

Criminal Justice (Legal Aid) Act 1962

Employment Equality Act 1998

Equal Status Act 2000

Equality Act 2004

European Convention on Human Rights Act 2003

Housing Act 1966

Human Rights Commission Act 2000

Jurisdiction of Courts and Enforcement of Judgements (European Communities) Act 1988

Protection of Children (Hague Convention) Act 2000

Sex Offenders Act 2001

### Statutory Instruments

Civil Legal Aid Regulations 1996 & 2002 S.I No. 273 of 1996 and S.I. No. 8 of 2002

Civil Legal Aid (Refugee Legal Service) Order 1999 S.I. No.74 of 1999

Civil Legal Aid (Refugee Legal Service) (No.2) Order 1999 S.I. No. 262 of 1999

### Council of Europe

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