

# **How public interest law and litigation can make a difference to marginalised and vulnerable groups in Ireland**

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## **Introduction**

This paper is based on the findings of a research project commissioned by FLAC (Free Legal Advice Centres) and funded by the Atlantic Philanthropies. The purpose of the research was to examine the potential role of public interest law and litigation in improving the position of disadvantaged and vulnerable groups in Irish society.

## **Defining Public Interest Law and Litigation**

PILL is not a term which is very familiar in an Irish context. Public interest law is not a field of law in the normal sense of the term (i.e. such as, for example, family or company law). Rather it is a way of working with the law for the benefit of vulnerable and disadvantaged people. In the literature there is no one precise definition of public interest law which is widely accepted. Indeed, the meaning of the term is influenced by the legal and political culture of the society in which it operates.

Drawing on existing literature, public interest law involves

- 1) *Law reform* – this can include research on issues of concern, developing reform proposals, lobbying and campaigning;
- 2) *Legal education* – this involves incorporating an awareness of public interest into third level and professional legal education through, for example, the teaching of public interest law or the development of clinical (i.e. practical) legal education as a structured part of the course of education;
- 3) *Community legal education* – this involves a range of measures to ‘demystify’ the law and to raise awareness of the law amongst disadvantaged and vulnerable people. Examples include the provision of information materials (in print or on-line); community legal education projects, training, ‘Street law’ programmes in the USA and elsewhere which use law students to deliver legal education to members of the public;
- 4) *Public interest litigation* – this involves the use of litigation (i.e. the process of bringing a case to court) in a strategic manner to advance the position of disadvantaged and vulnerable groups. It involves a wide range of activities from the identification of an issue, identification of potential cases, preliminary advice, bringing of the case itself, and the implementation of the court’s decision.

It should be noted that public interest law is not synonymous with *pro bono* work carried out by the legal professions. Despite the similarity in terms (*pro bono publico* meaning ‘for the public good’), *pro bono* work may include ‘public interest’ work in the sense used here but will frequently be for a mainly private benefit. Conversely, some public interest work may be carried out on a *pro bono* basis but much will be paid.

Thus, for the purposes of this research, we understand 'public interest law' to be a way of working with the law for the benefit of vulnerable and disadvantaged people while 'public interest litigation' is one of the methods of implementing this approach.

### **Role of and rationale for PILL**

Support for public interest law and litigation is premised on the assumption that it is legitimate to use the legal system and the courts to advance the position of disadvantaged and vulnerable groups in Irish society. It is important to ask whether this is a valid assumption. It is sometimes suggested that reliance on the courts undermines the democratic system. However, insofar as PILL is concerned, this is a mistaken argument.

PILL in its broader definition does not specifically involve the courts but rather assists disadvantaged and vulnerable people in having an input into the democratic process through, for example, being involved in a process of law reform or by participating more fully in the outputs of the legislative process (i.e. by being more fully aware of rights and responsibilities created by legislation).

Insofar as public interest litigation does directly involve the courts, the use of the courts to advance the position of disadvantaged and vulnerable groups can be seen as perfecting the democratic process rather than as a challenge to it. Our constitutional system of government is based on the separation of powers between the legislature, executive and the judiciary. An essential part of the separation of powers is the operation of a system of checks and balances between the different arms of government. It is important that the role of the executive in, for example, implementing legislation should be checked both by its responsibility to the legislative branch (the Oireachtas) and by being subject to review by the judiciary. Similarly, the legislation adopted by the Oireachtas must be subject to review by the courts to ensure that legislation complies with the requirements of the Constitution.

An example of the need for such checks and balances is the recent nursing home issue where it was found that certain charges for public nursing home care were unlawful. This practice had gone on over a number of decades leading to a very significant amount of arrears being owed to the individuals affected. A proactive public interest law approach could have led to this issue being highlighted and resolved at a much earlier stage to the ultimate benefit of all concerned.

The operation of this system of checks and balances simply involves the application of our established Constitutional system of government. Other sections of the community, such as, for example, the business community, have ready access to the courts where their interests are at stake. It is essential for the balanced operation of our democracy that all sections of the community (including disadvantaged and vulnerable groups) should also be able to ask the courts to review the actions (or inaction) of the other arms of government or to resolve disputes with other parties.

## **Public interest law in Ireland**

The development of public interest law and litigation (although the term itself is not widely used) has been extensively documented in Gerry Whyte's excellent publication *Social Inclusion and the Legal System*. In his overall evaluation of public interest litigation in a number of different areas Whyte finds that

- In the area of social welfare, public interest litigation has been 'effective in protecting the procedural rights of welfare claimants and occasionally effective in removing anomalies from the system but generally [did] not improve access to welfare income for disadvantaged individuals or groups in any significant way';
- In the area of children's rights, 'it has produced beneficial, tangible results, particularly in relation to meeting the educational needs of children with learning difficulties';
- In relation to Travellers' rights, litigation 'produced some limited gains for Travellers';
- Finally, 'the pursuit of a litigation strategy to enhance access to legal services ... had mixed results' resulting in the significant expansion of the criminal legal aid scheme and arguably being an important factor leading to the introduction of civil legal aid but contributing to the fact that the latter was bereft of any strategic element for tackling social exclusion.

Whyte emphasised that while 'not a universal panacea for the social problems of our country', public interest litigation could achieve significant results. However, he found that 'litigation, in isolation, is rarely sufficient' and that engagement with the political and bureaucratic system, such as lobbying for law reform, is also essential.

Whyte outlines how the attitude of successive governments to issues concerning 'access to justice' has been cautious (if not hostile) and how the civil legal aid scheme has, over a long period of time, been both narrowly defined in terms of the work it can carry out and inadequately resourced.

## **Current status of PIL in Ireland**

### 1) Law reform

Generally speaking, NGOs interviewed reported positively on the current process of law reform. Most reported that departments were prepared to meet with them to discuss issues in the process of preparing law reform proposals. Equally, NGOs generally commented favourably on the fact that Oireachtas committees (and individual members of the Oireachtas) were prepared to meet with them and to discuss their concerns.

Few NGOs had much (or any) contact with the Law Reform Commission. This is perhaps unsurprising given its limited functions. However, it does appear that the focus of the Commission is very much on the legal - rather than social - aspects of law reform. While the Commission involves a wide range of groups in its deliberations, the focus is very much on legal expertise rather than on consultation with NGOs from

a broader policy perspective. The Commission did recently organise a public meeting in Ballymun to discuss its proposals on cohabitation and this represents a welcome development of its normal working methods. The South African Law Reform Commission appears to take a much more 'social' and proactive approach to its work and might serve as a useful model.

In summary, NGOs reported quite a positive experience of the law reform process from the point of view that they were able to make their views heard in the process - emphasising that this does not necessarily mean that their preferred position was reflected in the final outcome. However, it seems clear that the less well organised and resourced the organisation, the greater the difficulty it will have in developing proposals. While most groups interviewed were well able to identify key issues and to make proposals for reform, these were frequently of a somewhat general nature. Many NGOs, particularly those without legal staff, indicated that they were not necessarily able to analyse an issue from a legal perspective or to prepare detailed legal reform proposals.

## 2) Legal education

There is a very limited focus on public interest law in many of Ireland's universities and professional law schools. Several law schools do teach subjects in the general area of public interest law. For example Trinity College has a public interest law course while NUI Galway has a particular focus on disability law. However, in most law schools, the focus on public interest law is quite limited.

UCC is currently beginning a BCL (clinical legal education) in which students who opt to participate will spend a year working externally with organisations including the Legal Aid Board, the DPP, and the UNHCR. NUI Galway is also in the process of developing clinical legal education as a structured part of its law degree. It is anticipated that work placements for academic credit will be made available on a pilot basis to 35-40 final year students in BCL in the academic year 2006-07. At present a database of potential employers is being developed which will include NGOs working with disadvantaged groups and solicitors.

The recent report of the Competition Authority on the legal profession also has implications in this area. The Authority recommends the abolition of the educational monopolies enjoyed by the Kings Inns and the Law Society in respect of professional legal education. If implemented, this recommendation would mean that other educational providers could be involved in the provision of professional legal education and might increase the relevance of the clinical legal education approach.

There are few (if any) structured links between law schools and NGOs involved in public interest law issues. Insofar as such links do exist they are very much of a personal nature with individual law lecturers and, consequently, likely to cease where a lecturer moves on.

Finally, the number of persons from disadvantaged and vulnerable backgrounds who undergo legal studies at undergraduate or professional level is very low.

Overall, this means that the persons qualifying with law degrees or as lawyers tend to be from better-off backgrounds, that they receive very limited exposure to public interest law issues during their third level and profession training; and, conversely, that very few persons from disadvantaged and vulnerable backgrounds qualify as lawyers. In addition, the very significant resources of law schools in terms of ability and expertise (on public interest law) are not made available to the wider community in any structured manner.

Interviewees suggested that there was a need to address all the issues outlined above: first by taking steps to increase the proportion of people from disadvantaged communities undergoing legal training; secondly by increasing the teaching of public interest law issues within law schools (including professional law schools); and finally, by developing more structured linkages between the law schools and, for example, independent law centres.

There are currently a number of interesting initiatives in this area including

- the development of clinical legal education in UCC and NUI Galway,
- the establishment of the LEAP (Legal Education for All Project) involving ITM, Ballymun Community Law Centre, Northside Community Law Centre, the Immigrant Council and Trinity College Dublin.

In addition, one way of providing a co-ordinated response to the different issues discussed in this section would be the establishment of a Centre for Public Interest Law which would:

- 1) Research public interest law issues, particularly in a comparative legal context;
- 2) Provide advice and support to independent law centres (and possibly to others involved in the area) on PILL;
- 3) Further develop links with community groups to support the provision of community legal education;
- 4) Teach public interest law to law students.

### 3) Community legal education

Community legal education involves the provision of information and education on the law (including legal rights and responsibilities) to the general public and, in particular, to disadvantaged and vulnerable groups. There is very little provision of community legal education in Ireland at present. Many of the independent law centres are involved in the provision of talks and information leaflets about specific legal topics. In addition, Comhairle and the Citizens Information Centres which it supports are heavily involved in the provision of citizens' information. However, this tends to be general rather than specifically legal information.

The LEAP project, referred to above, is a very interesting example of an innovative project bringing together a range of organisations to provide legal education to disadvantaged groups. A further innovative example is the Participation and the Practice of Rights project in the areas of north inner city Dublin and Belfast. Both

projects are practical attempts to increase the legal knowledge and skills of people from disadvantaged and vulnerable communities.

In discussions with NGOs there was a very high level of demand for community legal education in a variety of forms from basic information to more in-depth training courses.

#### 4) Litigation

Finally, we look at the current situation concerning public interest litigation. As part of the research, a research study examined all written decisions of the High and Supreme Courts in 2003 and 2004 to identify the proportion of public interest cases. The definition of public interest cases was adapted from a somewhat similar study carried out in the UK by the Public Law Project:

Cases which raise issues, beyond any personal interests of the parties in the matter, affecting identifiable sectors of the public or vulnerable groups;  
seeking to clarify or challenge important questions of law;  
involving serious matters of public policy or general public concern;  
and/or concerning systematic default or abuse by a public body.

In total, over the two years, only 33 judgements were found to fall within the definition of public interest litigation as outlined above. This means that only 3.5% of all written judgements from the High and Supreme Courts in 2003 and 2004 involved public interest litigation (as defined). While the number of public interest cases identified obviously depends on the precise definition chosen, this does indicate a rather low level of public interest type litigation in Ireland. A slightly broader definition of public interest would not significantly increase this level.

This impression of a rather low level of public interest litigation was supported by interviews. Generally speaking, the independent law centres, which have a wide range of other responsibilities, are involved in little public interest litigation. Private practitioners indicated that public interest litigation is concentrated amongst a rather small number of solicitors offices and generally in small to medium size firms.

Unfortunately, there does not appear to have been a comparable study of the level of public interest litigation in other jurisdictions. However, interviews with respondents in the UK and Northern Ireland would suggest that there is a significantly higher level of public interest litigation in neighbouring jurisdictions.

A number of respondents with experience both in Ireland and in neighbouring jurisdictions also expressed the view that public interest litigation was comparatively underdeveloped in Ireland.

However, the priorities of those non-legal NGOs interviewed were primarily in the area of assistance with law reform and community legal education rather than with public interest litigation. In general, this was due to the fact that, while groups might have identified a potential legal issue, they did not have the expertise to analyse it and establish whether there might be a legal remedy to the problem and, if so, whether litigation might be a viable avenue.

## **Government and legal sector policy**

### **1) Government**

Unsurprisingly, given that the concept is not a commonly used one in an Irish context, the Irish government does not have an officially established policy on PILL. Thus policy has to be identified in the different areas coming within the definition. And, of course, policy often varies between government departments and other public agencies.

*Law reform* - Generally, government encourages consultation with and involvement of NGOs in relation to the development of policies (i.e. law reform). Based on the generally positive response from NGOs, this policy would appear to be generally implemented in practice. However, government does not generally provide resources for legal research into issues of law reform although individual groups may be able to access specific resources under specific headings.

*Legal education* - There is little explicit policy in this area and the content of legal education is largely left to the individual law schools. In recent years, the Department of Education and Science and the Higher Education Authority has emphasised the importance of improving access to third level education for disadvantaged groups, for example, through funding third level access programmes. In general, these are not focussed on specific areas such as legal studies.

*Community Legal Education* - As in the UK, there is an absence of any clear or comprehensive policy on community legal education. The provision of 'citizens' information' (which is a related area) has been developed greatly in the last decade through the expansion of Comhairle, the development of a citizen information database (Oasis) and the development of local citizen information services. These are supported by funding from the Department of Social and Family Affairs. However, there is little funding or support for more specifically legal education.

*Litigation* - While there is no specific policy on this topic, the general perception amongst respondents would be that government would be less than enthusiastic about supporting public interest litigation (in part because public bodies are often the defendants in such litigation). The longstanding reluctance to provide adequate funding for civil legal aid (albeit that resources have increased significantly in recent years) and the oft-stated concerns about providing a rights-based approach to the provision of disability services would all suggest that government might be expected to have reservations about public interest litigation. Having said that, a number of public bodies such as the Equality Authority are already involved in public interest litigation and it is likely that the Irish Human Rights Commission will increasingly be involved in such litigation in the future.

## 2) Legal professions

### *Bar Council*

The Bar Council has recently established a *Voluntary Assistance* scheme which has very significant potential to make a major contribution in the area of public interest law and litigation. The Bar has established a list of barristers prepared to provide *pro bono* services. Unlike the traditional *pro bono* approach, however, this is focussed on voluntary organisations (rather than individuals). Nor is it confined to legal representation but can also be adapted to meet the needs of NGOs. So, for example, it might involve training in advocacy skills so that the staff of an NGO could represent persons before an administrative tribunal, or the development of law reform proposals. To date it appears that the take-up of this service has been slow. The consultation process indicated that this was a key issue to be addressed if the scheme is to operate to its full potential. NGOs are not aware of the scheme and even when made aware the lack of any previous experience of direct contact with the Bar Council is likely to inhibit take-up.

### Law Society

The Law Society has no specific policy on public interest law litigation. It does not have a public interest law committee. A *pro bono* scheme was considered by a committee in recent years but nothing was agreed. The Society does organise occasional conferences in areas relevant to public interest law such as immigration law.

### **Capacity to pursue PILL strategy**

As set out above, the current provision of and approach to PILL is at an early stage of development. In most cases, there is no clear policy support for PILL from government or the legal profession. The main source of public interest litigation is currently private solicitors (generally from small-medium size firms). The independent law centres are involved in a variety of activities in the area of PILL but most are small and many have somewhat insecure or inadequate funding. Overall, there is currently limited capacity to pursue a PILL strategy and there is a need for strategic investment in the area if such a strategy is to develop.

Overall this research finds that public interest law and litigation (and its component parts) are at an early stage of development in Ireland. There is limited explicit public policy in the key areas although the Bar Council has recently introduced a potentially important *Voluntary Assistance* scheme and individual members of the legal professions make a vital contribution through their *pro bono* involvement in public interest litigation. There is significant demand and support for the further development of the different aspects of a PILL approach from NGOs and individuals.



## **Public Interest Litigation**

Insofar as public interest litigation is being carried out in Ireland, the vast bulk of cases are being brought by solicitors in private practice. In general, public interest litigation tends to be brought by a relatively small number of solicitors and is heavily focussed on small-medium sized firms. The independent law centres have a wider role than simply litigation and many are involved in wider PILL activities. However, perhaps unsurprisingly given their limited resources, their contribution to the overall level of public interest litigation in Ireland is currently very limited. The state-funded Legal Aid Board also has a limited involvement in public interest litigation due to the fact that its work is focussed primarily on individual family law casework.

### Does litigation have a role in advancing the position of disadvantaged groups?

The overwhelming reaction of interviewees was that public interest litigation could have a role in advancing the position of disadvantaged and vulnerable groups. This is not, of course to say that all cases brought were 'successful'. However, interviewees - who all had considerable practical experience of bringing cases - all felt that the courts did have a role to play in this area and most pointed to areas where they felt there was potential to bring further cases.

### Volume of cases

Some respondents reported a dramatic increase in the volume of cases, e.g. in the areas of refugee and immigration law. Others, however, reported that certain cases had declined in recent years in part as a result of the *Sinnott* case and similar decisions.

### Type of cases

Lawyers interviewed were involved in public interest litigation in a very wide range of areas including children's rights and education, refugee and immigration law, Traveller's issues, criminal law and prisoners' rights, public housing, right to home births, inquests, rights of homosexual persons, and the right to legal aid.

### Unmet demand?

Most interviewees felt that there was considerable 'unmet demand' for representation in relation to public interest issues.

## **Barriers to public interest litigation**

### Costs

The primary barrier mentioned in bringing public interest litigation was undoubtedly the cost involved. Issues in relation to costs came under a number of different headings including the lawyers costs, the risk of costs being awarded against the client, difficulties in recovering costs, and costs of expert witnesses.

*i) Lawyers' costs* - In the case of the private solicitors, clients involved in public interest litigation were generally not in a position to meet the costs involved (or at least not the full costs). Accordingly, solicitors operated either on a *pro bono* (no fee) basis or charged a relatively nominal amount. The method of operation is clearly financially dependent on achieving a sufficiently high success rate to meet the costs involved in all the cases brought. Accordingly solicitors generally reported that they carefully vetted cases to ensure that they had, in general, some reasonable prospect of success.

In the case of barristers' costs, there was some difference of perception between solicitor and barrister interviewees. In general barristers, and it should be recalled that these were all barristers involved in public interest litigation, considered that barristers were prepared to take-on public interest cases without any guarantee of payment. Solicitors generally agreed that it was possible to obtain the services of a barrister for public interest work. However, a number of solicitors suggested that while willing to act, unpaid barristers were perhaps unable to give the same degree of commitment to a case that they would if guaranteed payment. A number suggested that they would like to be able to guarantee some level of payment to a barrister (although not the full commercial rate).

In the vast majority of cases brought by private solicitors, there was no public financial support for the cases. This is clearly a very significant difference to the position in the United Kingdom where legal aid is available for many public interest type cases.

In the case of independent law centres, the costs of core staff were, in general met from public funds. However, a number of the law centres considered that the level of resourcing which they received was inadequate to meet the demand for their services (including in the area of public interest litigation).

*ii) Client costs* - A number of respondents reported that the prospect of having to meet the costs of the case (in particular the costs of the other side) if the case was unsuccessful was a deterrent to some clients bringing cases. Respondents generally reported that the state was more likely to seek and the judiciary to award costs against an unsuccessful litigant (even where the case was broadly a public interest issue) than they would have been in the past. Given the cost of litigation, this could represent a very significant cost to the individual concerned.

*iii) Issues in recovering costs* - A number of independent law centres expressed concerns that they might have difficulty in recovering costs against the other side even in a successful case. This is on the basis that such law centres would not in general charge their clients for their services and that, therefore, as the client had no exposure to costs, the other side was not responsible for the costs incurred.

*iv) Costs of expert witnesses, reports, etc.* - Both private and independent law centre solicitors reported difficulties in arranging for expert witnesses and related issues (e.g. reports, interpreters, etc.). In the case of private solicitors, while prepared to act without payment on a 'no fee, no cost' basis, they were more reluctant to fund additional costs of the litigation. Similarly, while the staff and administrative costs of independent law centres were met, in some cases additional litigation funds were very

limited. Respondents reported that the pro bono tradition which exists in the legal profession was not generally to be found in other professions and that the clients involved were often not (or only with great difficulty) able to meet the outlays involved.

#### Linking persons with a 'legal' issue to legal services

A number of respondents reported that clients were understandably reluctant to get involved in the somewhat complex, stressful and unfamiliar process of bringing legal proceedings. In addition to concerns about costs, mentioned above, some clients were deterred by the complexity of the process, by concerns that bringing a case against a public body might rebound on them in future dealings with that body and because of legal issues concerning their status (e.g. illegal workers).

In addition, some respondents reported that in some cases where they had identified a legal issue, it proved difficult to find a suitable plaintiff to bring a legal challenge either because possible plaintiffs were deterred from bringing cases for the reasons discussed above, because possible plaintiffs simply moved away (recall that much public interest litigation involves highly mobile groups such as migrants and Travellers), or that the background of potential plaintiffs made them a less than optimum choice for a test case (e.g. persons with a previous criminal record).

One practical difficulty in bringing public interest litigation is that of making the link between the individual or group with a problem and the legal services which could assist in resolving that problem. In the case of private solicitors, it was clear that these links currently operated on a very ad hoc basis. Clients became aware of services largely through word-of-mouth by referral from other persons using the services, from other solicitors or from NGOs. The solicitors interviewed appeared to have little difficulty in finding clients but there may well be other solicitors prepared to offer similar services who were less well able to do so and clients may be unable to find solicitors willing to take their cases. There appeared to be limited communication between solicitors working in relatively new areas of law (such as refugee and immigration law) and the Law Society appears to provide limited (if any) support at present.

In the case of independent law centres, referral also appeared to operate on a somewhat ad hoc basis. Some law centres are area-based whereas others focus on specific issues. There is a considerable difference between the situation in this jurisdiction and that in the UK. In the UK, legal NGOs tend to be long established and reasonably well resourced. Organisations interviewed appeared to have clearly defined areas of work in which they would provide advice or assistance and these policies appeared to be known to other legal NGOs. In other words, UK legal NGOs had developed clear policies specialising in specific policy areas and these were widely known. In Ireland, independent law centres tend to be much smaller, often recently established and less well resourced.

#### Judicial attitudes

Respondents differed significantly in their views on judicial attitudes. Some felt that judges tended to be strongly pro-defendant (where the defendant was a public body)

and to allow flexibility to public authorities which would not be extended to members of the public and/or not to be open to social reform. Others reported no barriers to public interest litigation from judicial attitudes. Others again reported varying attitudes depending on the member of the judiciary encountered.

More broadly a number of respondents referred to the fact that the approach adopted by the Supreme Court in the *Sinnott* case limited the scope of significant public interest litigation. Others, however, while acknowledging the limits imposed by *Sinnott* felt that their remained considerable scope within those limits.

### Procedural issues

There are a number of potential procedural barriers - such as the absence of anything akin to a class action procedure under Irish law - to bringing public interest litigation. However, these rarely emerged in interviews as being important in an Irish context. This may well be due to the relatively early stage of development of public interest litigation in Ireland. It may well be that if a greater volume of such cases was being brought, then procedural issues might emerge as being of great concern.

One procedural issue which was raised was the possibility of having a moot point determined by the courts. It has been suggested that public bodies may choose to settle a case which they feel they will lose so as to avoid the possibility of a court ruling. Thus although the individual litigant may benefit, the wider benefits of a positive decision are denied to the group of persons affected.

A further issue suggested by experience in the UK - although rarely raised by Irish respondents - is the possibility of an NGO having locus standi to bring a case in an area in which it is concerned. This would avoid having to search for an individual litigant who might be reluctant to bring a case for a variety of reasons. An example might be whether the Free Legal Advice Centres would be entitled to bring a case in relation to delays in access to civil legal aid. The High Court has recently held that the Irish Penal Reform Trust has locus standi to bring proceedings in a case involving the rights of prisoners with mental illness who were unable adequately to vindicate their rights.

### Implementation and Enforcement of decisions

Enforcement of decisions is important from the point of view of public interest litigation. Insofar as the objective of such litigation is to improve the position of disadvantaged and vulnerable groups, the key issue is not whether individual litigation is successful but whether on balance the position of such groups has been improved as a result. It was clear from respondents that public bodies involved in litigation did change policies (and in some cases legislation) as a result of litigation. In some cases, this led to improvements from the point of view of the group involved but in others the law or administrative practice was simply brought into line with the original intention of the public body. Private solicitors, because of the nature of their work, tended to be more concerned with the outcome of individual cases and less concerned with the broader policy context. Law centres were able to be more concerned with the

overall policy context and experience in the UK has shown that legal NGOs have the potential to follow issues over time to the benefit of specific groups.

## **How to overcome the barriers**

### Costs

*i) Lawyers' costs* - The fundamental issue in relation to the legal costs involved in bringing public interest litigation is the absence of a comprehensive scheme of civil legal aid. The Irish legal aid scheme is, in practice, largely confined to family law cases. In contrast, much public interest litigation in the UK is funded through legal aid. Cases which might otherwise be excluded from the scope of legal aid may be funded where they raise an important issue of public interest. In addition, many legal NGOs are funded on a contract basis to provide specialist legal aid and advice.

It seems highly likely that the different availability of legal aid in the UK and Ireland has contributed significantly to the different levels of development of public interest litigation in the respective countries. One option would be for government to improve the Irish legal aid scheme so as to allow adequate funding for public interest litigation. However, in a situation where access to legal aid for even family law cases remains subject to waiting lists, it seems unlikely that government would see the funding of public interest litigation as a priority. Accordingly, we look at a number of alternative approaches.

One option is the establishment of a Public Interest Litigation Fund to resource public interest litigation. The basic idea is that a private body (or bodies) might invest resources in a fund which would be used to support public interest litigation.

*ii) Client costs* - There are a number of options in relation to reducing or controlling the client's exposure to costs. One is the increased use of non-court fora such as, for example, Ombudsman schemes where costs are not awarded.

A second issue is to re-examine the basis upon which the courts award costs against a public interest litigant. This issue has received some consideration in a number of recent High Court decisions. In a recent decision, the High Court held that the exercise of the court's discretion to depart from the normal rule that costs follow the event is governed by two principles:

- 1) that the plaintiff was acting in the public interest in a matter which involved no private personal advantage; and
- 2) that the issues raised by the proceedings are of sufficient general public importance to warrant an order for costs being made in his or her favour.

However, the jurisprudence as to when costs will be awarded in public interest litigation remains unclear. It would be helpful if the approach which will be applied was clarified by the judiciary and, insofar as possible, standardised. The constitutional importance of access to the courts and the absence in practice of legal aid in many cases should be taken into account in such clarification.

In the United Kingdom and other jurisdictions, the device of 'protective costs orders' has been developed. This is a procedure by which a party to proceedings can apply to court in advance of the substantive hearing of a case for an order limiting the party's exposure to costs. The Irish High Court has held that it does have jurisdiction to grant such an order but it does not appear that such an order has been granted to date by the Irish courts. It would be helpful if the Irish courts clarified the principles upon which such an order would be granted in an Irish context having regard to the English approach and to the differences in terms of access to the courts in the two jurisdictions. However, it would appear necessary, if advance orders are to be made as to costs, that the courts should also clarify the overall basis upon which orders as to costs are to be made in public interest cases (as discussed above).

iii) *Recovering costs* - One way to address this issue would be for solicitors to make their clients aware, in advance, of their liability for costs irrespective of the outcome of the litigation. Such a practice would protect the solicitor's right to be paid fees by the other side but if the litigation was subsequently unsuccessful, the solicitor might decide not to enforce such a right. However, this is a somewhat artificial arrangement and it only adds to the difficulty of explaining already complex issues to a client (and requires a considerable degree of trust on the part of the client). The Civil Legal Aid Act [s. 33] addresses this issue in relation to persons covered by legal aid and it would appear desirable that similar clarification should be provided for by legislation in relation to non-legally aided persons who are being assisted by a law centre or on a *pro bono* basis.

iv) *Costs of expert witnesses, etc.* - Again in the absence of more comprehensive legal aid, one option would be to meet these costs through a Public Interest Litigation Fund.

### Judicial attitudes

A number of respondents suggested that judicial training in relation to public interest issues - as part of judicial studies organised by the Judicial Studies Institute - would be helpful.

### Procedural issues

The Law Reform Commission has recently published the results of its study on class actions. As the area of public interest law develops this could become an important issue in facilitating litigation.

The Supreme Court has recently clarified the law in relation to *amicus curiae* applications in Ireland. This remains an underdeveloped area in this jurisdiction. In the UK, it is much more common for NGOs to intervene in public interest cases. This allows them to raise public interest issues of importance to them at a much more limited cost (and generally without exposure to other parties' costs). The *amicus* procedure has important potential in an Irish context. However, the limited number of public interest cases going before the Irish courts mean that this potential is currently limited in practice.

The issue of moot cases is also one of more immediate importance. In the UK, the House of Lords has held that it has the discretion to hear an appeal concerning an issue involving a public authority as to a question of public law where this was in the public interest even where the issue was strictly moot. A similar approach might usefully be adopted in this jurisdiction.

### Enforcement of decisions

In relation to the enforcement of judgements, it has been suggested that public bodies should be under a legal obligation to review persons affected by the outcome of a judicial decision (where this is possible based on the files which they hold). In practice, such an approach has been adopted in a number of cases in Ireland, e.g. in relation to claims for 'equality' arrears under the social welfare code and the Ombudsman encourages public bodies to adopt a similar approach to ensure the full enforcement of her decisions.

## **Development strategy**

### Overall approach

When reference is made to PILL, many people immediately focus on the litigation aspect. However, the experience in this country and in neighbouring jurisdictions indicates that a public interest litigation strategy works best when it is part of a broader public interest law approach involving issues such as law reform and legal education. It is suggested that a development strategy to advance public interest law and litigation should adopt a comprehensive approach to PILL and should provide an integrated range of supports to measures in different areas.

### Law Reform

The key issue identified in this area is the need for NGOs representing disadvantaged and vulnerable groups to be able to identify legal issues and prepare detailed law reform proposals. The *Voluntary Assistance* scheme introduced by the Bar Council provides the opportunity to avail of legal expertise. However, it seems unlikely that this opportunity will be fully taken up unless specific steps are taken to bridge the gap between the groups who need advice and assistance and the barristers who can provide this.

One option is that a legal policy officer be appointed whose role might include:

- i) meeting groups with law reform issues to help them to address the precise nature of the issue and possible approaches; and
- ii) putting them in contact with a barrister under the Bar Council scheme.

There is currently a lack of specific funding to support law reform and this could be addressed if a legal research fund was established to facilitate NGOs in carrying out legal research.

## Legal education

The development of a strategy in this area might include the following measures.

- 1) Law schools should examine the extent to which their intake of students includes persons from disadvantaged and vulnerable backgrounds and should work closely with access programmes to increase the proportion of law students from disadvantaged backgrounds. This should include working with specific local secondary schools to improve the legal education of young people from disadvantaged areas/groups and encourage interest in the law.
- 2) Professional law schools should similarly examine the extent to which students from disadvantaged backgrounds are represented on their courses and should examine what needs to be done (including the operation of existing scholarship schemes) to increase uptake.
- 3) Law schools should examine the concept of clinical legal education and consider whether it (or some aspect of variation of this approach) would be appropriate to them. This may require additional financial support to allow the employment of a person to co-ordinate such courses.
- 4) A Centre for Public Interest Law should be established in a university with the remit of carrying out research on public interest law issues, particularly in a comparative legal context; providing advice and support to independent law centres (and possibly to others involved in the area) on PILL; further developing links with community groups to support the provision of community legal education; and teaching public interest law to law students.

## Community Legal Education

In the area of community legal education, there is currently very little happening. There is a need to resource innovative approaches to see what works and how policy in this area might be developed.

One option is that a fund be established to resource innovative and important initiatives in the area of community legal education (similar to the LEAP and Participation and Practice of Rights initiatives). This fund would provide support to innovative projects over a five year period (on a once-off or ongoing basis).

The operation of such a fund should be discussed with key players including the Legal Aid Board, Comhairle and the Department of Social and Family Affairs. Measures funded should be evaluated.

## Litigation

Overall, the capacity to pursue a public interest litigation strategy is somewhat limited. It is recommended that development in this area should aim to expand capacity in a measured way over the medium term (i.e. say five years) rather than aiming for a dramatic increase over a short period.

## *Costs*



The fundamental issue in relation to costs is the lack of a comprehensive scheme of civil legal aid. The following options can only go part of the way to addressing the costs issues in the absence of such a scheme.

Options include

- 1) A Public Interest Litigation Fund be established to help to meet the costs of certain public interest cases and to help to develop a greater body of litigation. Public interest litigation should seek to clarify the legal position on costs including that concerning protective costs orders. The judiciary should be open to an interpretation which will support public interest litigation having regard to the constitutional importance of access to the courts and the limitations of the existing legal aid scheme.
- 2) The law concerning recovery of costs should be amended to ensure that costs can be recovered in pro bono and law centre cases.

#### *Procedures*

Public interest litigation should seek to clarify the legal position on procedural issues including the locus standi of NGOs and the possibility to adjudicate on important moot points.

#### *Referral lists*

A number of NGOs already have formal or informal lists of solicitors interested in a particular area of public interest law to whom they refer persons with legal issues. It is recommended that more NGOs should develop and keep up to date such referral lists.

#### Next steps

Further development of an appropriate strategy to advance the required infrastructure and resources depends significantly on the extent to which private funders, foundations, the legal profession and statutory agencies are prepared to commit resources to this area and the extent to which they are prepared to play a key role in developing the strategy. The future development of public interest law and litigation in Ireland can only succeed through the co-operation of a number of key interest groups. It is the objective of this research to act as a starting point for discussion and debate leading to such co-operation amongst the key organisations.