

**LEGAL AID BOARD**

**ANNUAL CONFERENCE 2014**

**CLYDE COURT HOTEL**

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**“CIVIL LEGAL AID IN A RAPIDLY CHANGING WORLD”**

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CHAIRPERSON**

## **Introduction**

I am delighted to be here at what is now my third Annual Conference. The Conference Title “Civil Legal Aid in a Rapidly Changing World” is topical and I look forward with great interest to the presentations from all of our speakers. This is a day, however, where we also want to hear your views. You will see that there are two panel discussion sessions and I am going to ensure that time is preserved for that discussion and to hear from you. I will therefore be asking the speakers to keep to their timelines and for everyone to adhere to the timelines for coffee break and lunch.

## **A Little Bit of History**

FLAC was started in 1969 by a group of law students and the demand from ordinary people for legal advice surprised even them. My own recollection at the Rialto FLAC Centre was queues of people waiting patiently to get advice from a second year undergraduate law student! This was 1973. I think it is important to recall what these times were like.

Accessing legal information was a challenge even for a law student. There were virtually no law books on Irish law. The only two I can remember are Sean O’Siochain on Criminal Law and the late John Kelly’s on The Constitution. Getting information involved a trip to the Government Publications Office in Molesworth Street to get a copy of the Bill or Act and the explanatory memorandum and trying to do your best with that. Alan Shatter’s, “Family Law in the Republic of Ireland” published in 1977 was a giant leap forward. As the preface states:

“This book is written not only with the law practitioner and law student in mind, but also having regard to all those without legal training who in their professional or voluntary work may look to this area of law for assistance.”

That was then. Forty years on the capacity to access information now is almost unlimited. So the current challenge is to direct people to the right information, help them interpret that

information, help people make choices, help people make good decisions.

Although the first Law Centre opened in 1980 Civil Legal Aid was only put on a statutory footing in 1995 with the Act that we all now know so well.

The long title 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.”

We are familiar with the criteria and scope:

- Financial eligibility
- Merits test for advice (Section 26)
- Merits test for aid (Section 28)
- The scope of the scheme

I would like to say a little bit about each.

### **Financial Eligibility**

An individual must satisfy the financial test of disposable income and capital. Currently disposable income is the Applicant's gross income from all sources less various allowances in respect of spouse, dependents, mortgage, tax etc. The current disposal income limit is €18,000 per annum. The income limit was set in September 2006 and has not been varied since. The capital resources are treated separately. Currently the disposable capital which exceeds €100,000 (excepting the family home) is taken into account. This capital threshold amount was reduced last year from €320,000. This is in line with reductions in other thresholds, for example, for C.A.T. (Class A) went from €434,000 in 2009 to €225,000 in 2012. It is not anticipated that this reduction in capital amount will significantly decrease applicant numbers.

A study conducted in 2008 but based on 2006 data indicated that some 48% of the population was financially eligible for legal services from the Legal Aid Board with 38% qualifying for the

minimum contribution only. These statistics have not been updated but in the light of the downturn in the economy and the increase in the rate of unemployment it is likely that that percentage of eligible population is now higher.

As you know the contributions we now seek from clients were also increased last year to give the Board more resources from which to carry out our work but these are waived in many cases of hardship.

### **The Merits Test**

We are all familiar with the merits test. I would like us to look at the test under Section 28(d) and in the light of the general criteria at Section 24.

Section 28(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."

Section 24 describes the "reasonably prudent person".

What does this reasonably prudent person do who is not entitled to Legal Aid. The private practice experience shows that they simply cannot afford expensive litigation. They do seek advice but they make it clear that they cannot afford Court litigation and ask for other ways whereby matters can be resolved or seek to use the few euro that they do have in a very focussed and targeted way for advice. I will come back to this theme later.

### **Scope**

On first read of Section 28(a) you would say that the scheme for Legal Aid is very broad. Everything is included unless excluded.

There has been much commentary on the fact that representation at Tribunals (other than the Refugee Appeals Tribunal) are excluded. The rationale at the time was that Tribunals (such as the

Employment Appeals Tribunal or the Equality Tribunal) were supposed to be conducted “informally” and that legal representation was not necessary.

The reality is that these Tribunals take quite a legalistic approach, there is a body of case law developed and often influenced by EU regulations. Employers are regularly represented not only by solicitors but by Counsel or their professional bodies or senior personnel in their company such as a HR Manager. Some employees are represented by Trade Union officials or others.

The Minister can by ministerial order extend the scope of the scheme however realistically unless there is a serious increase in resources to the Board we could not adequately deal with that additional case load under our current budget.

It is however important that the issue of unmet legal need continues to be a topic of discussion.

The converse of extending the scope is also to examine if there are areas where we may need to exclude and start a discussion on that issue also.

The last five years have presented the Board with a cohort of possible cases which were unlikely to have been envisaged in 1995. A financially eligible Applicant may seek Legal Aid to defend proceedings in the commercial court. A financially eligible Applicant may seek to defend proceedings where a bank seeks repayment of a multi-million euro debt. A financially eligible Applicant may wish to sue a bank for mis-selling or sue business partners. These highly complex cases are not within the scope of the experience of our solicitors. A great deal of time, energy and commitment is spent on assessing the merits of such cases. We perhaps need to start a discussion as to whether or not this type of case should come within the scope of the Legal Aid Scheme and the implications of such a decision.

We must also be able to prove that altering the scope will produce positive benefits/time/resources to meet other legal needs.

## **Diversity of Legal Aid Work**

The Annual Report for 2012 shows that there were 17,652 cases of Legal Aid and advice. The bulk of this work is family law if one includes separation, divorce, custody, maintenance, domestic violence and other family law.

We all know that family law cases can be time consuming, labour intensive and demanding often leaving little time or scope for other work.

Reports from other jurisdictions at International Legal Aid conferences show that family law work often represents the biggest percentage share of civil legal aid work undertaken.

One of the aspects that I would like to look at is how can we do family work differently/more efficiently.

I do not have a crystal ball. I'm not an IT expert. I'm not a "blue sky" thinker. I believe in getting things done and even small changes can help and I believe passionately that we can do things better.

I also believe that the clients themselves know their families best and they should be supported to make the best possible decisions that they can for themselves and their families.

So how can we do this?

## **Empowerment**

The Law Reform Commission report 1996 commented on the system's negative ethos:

"Instead of concentrating on the empowerment of individuals to resolve their own family disputes, by encouraging negotiation and agreement, the emphasis of our system, with its concentration on adjudication, is on solutions which take control away from the participants. A humane system of family law, is one which encourages the responsible

resolution and management of disputes wherever possible by members of the family themselves. Judicial intervention is, of course, necessary to prevent exploitation or abuse between family members. The ideal of empowerment should not blind us to problems of inequality which may arise in a system of private ordering. This apart, it is perhaps time to consider how reforms in our legal processes may help in the process of personal and family empowerment.”

A greater number of cases would settle if parents were supported to make the best decisions for their children. Child experts who can explain the negative impact on children of continued conflict of their parents can help parents learn the skills necessary to parent post-separation.

The adage “give a man a fish and you feed him for a day. Show a man how to catch a fish and you feed him for a lifetime.”

Likewise have a Judge make a decision in a particular issue deals with that problem on that day but give the parties the skills and confidence to make good decisions for themselves and their families, they will not be repeat litigants.

I don't want to be alarmist but we may be storing up a cost of not helping parents in the critical area. In the collaborative model, practitioners are going more and more to the inter-disciplinary model. This means that there are coaches/counsellors helping the couples deals with the intense emotions that may overwhelm them or prevent them making good decisions and a neutral child expert helping with the children's issues.

I sincerely believe that the language that we use with our clients can increase or reduce their confidence and sense of empowerment.

I believe the success of the Dolphin project shows how clients if given the chance want to be empowered to make their own decisions. We also now have the chance to forge strong working relationships between solicitors and mediators. Both professions want what is best for our clients. We have different ways of

working, one size does not fit all. We need to listen to each other and learn from each other. If we use the iceberg example, the part of the iceberg above the waterline are the legal issues; the greater part of the iceberg below the waterline are the emotional issues which can have a far larger impact.

## **Self Help**

### **Information**

I spoke earlier of the “reasonably prudent person” and how they might now deal with matters if not entitled to Legal Aid. A potential client in private practice often wants to avoid a contentious court application firstly, because they may have some friends or other family who have gone through the Court process and they simply want to avoid or secondly, they simply do not have the funds for expensive litigation. Something that you can do for these clients at their first consultation is direct them to other information, websites, courses, agencies and resources.

I regularly use the following:

1. “When parents separate: helping your children cope” by John Sharry and others.
2. “Living with Separation and Divorce” Fiona McAuslan and Peter Nicholson.
3. “A short Guide to Divorce in Ireland” Helen M Collins.
4. The English Family Lawyers Associated called “Resolution – the first in Family Law” have an excellent website at [www.resolution.org.uk](http://www.resolution.org.uk). This really has a wealth of information all of which is set out in a very easy to understand way with lots of pictures and photographs and tips and YouTube videos.
5. There is also information available on the Law Society website and also Courts.ie but I would have to say it is less than engaging.

All law centres have been given copies of CDs of the film made by the Ombudsman for Children’s office and the Courts Service. There are two videos on the CD: one for parents “Finding your

Way” and one for children “You are not Alone”. Please ensure that a copy of this CD is given to every person who comes through the law centre door with a family law case involving children. Even if the person is ultimately not entitled to Legal Aid getting the CD will help them. I was looking at the courts.ie website and see the parents video had 253 views, the children’s 142 views.

The Family Mediation Service have just or are about to publish a new information booklet which is excellent.

## **Homework**

Another area where clients can do a lot to help themselves is in relation to getting their financial information and documentation together. I tell clients if they present their financial information to me in a mess and a muddle it will take time for me to sort it out and that is time that they will have to pay for. If however they can systematically go about getting their financial information and vouching documentation and present it to me in an orderly fashion then less time is spent. Giving clients a check list to follow for that is very useful to them. If the task is flagged well in advance they will have ample time to get all the documents they need. Getting clients to start this task at the earliest possible date is also important. Firstly, sometimes the documentation takes a while to come through particularly pension information but more importantly it ensures that the client is familiarising themselves with their financial situation. It also gives them the challenge of accurately recording information for the expenditure of the Affidavit of Means.

## **Solutions/Outcomes**

I personally believe in discussing solutions/outcomes with a client at the very first consultation even if the detail of the financial circumstances of the family have not yet been fully verified. In most cases the client will be able to give you the broad outline of the family’s financial circumstances. If you discuss with clients likely outcomes under the headings of children, the family home and maintenance and if agreement can be reached under those

headings it is unlikely that other areas such as the family car, savings, pensions, cannot also be resolved.

Very often solicitors and clients can get completely emerged in the process and the paperwork with little focus on the outcome.

Advising a client that their life and marriage is reduced to a sum of money is not easy. Often I couch my advice in a way that suggests I would like to do more but cannot. You might say if the facts of this case were presented to a court the Judge would be very sympathetic but conduct is not a factor that the Court can take into account and they will look at it in a much more clinical way and will see that there is an equity in the house and will try to ensure that you get the value that you are entitled to.

I often have this discussion with colleagues about whether one should deliver a real outcome at first consultation. Some colleagues believe that if one does so the client may not instruct them and may go elsewhere. Other colleagues may agree that the message needs to be delivered but perhaps not at the first consultation but when an element of trust has built up between solicitor and client that this conversation/advice can be given at a step further down the line. My own preference is to tell it as it is as early as possible. Each of you will have your own style also but I do think we owe to the client to give them our best guess of the outcome at the beginning of the case. I also think we need to give clients a realistic outcome. Do not give them the outcome that can only be achieved on the best presentation of the case, before the best Judge, with everything going your way.

The reality is that most Judges are in the same "ballpark". If on a scale of 1 to 10, a wife might want 70% of everything the husband may only be prepared to give her 30%. So the husband is at 3 and the wife is at 7. Absolute equality would be 50% or the number 5. Most Judges will be between 40% and 60% or 4 to 6. It is within that area that most cases are and will either be settled or fought over. There should be ample scope within those parameters for the parties to try to reach an agreement.

I know that you are all trying to balance the Triage appointments with progressing existing cases to second consultations and beyond. I, however, cannot overstate the support of all of the Board members of Triage appointments. An early first consultation can:

- Signpost to other agencies
- Homework tasks
- Consider outcomes/solutions

### **Educative Role of the Legal Aid Board**

While Director of FLAC in 1975/1976 we grappled with the consequences that our full time employed solicitor of the Coolock community law centre George Gill who was leaving and we had to advertise and interview for another solicitor so a sub-committee of FLAC being three or four under-graduates or just recently graduated had the task of interviewing. I distinctly recall the debates that we had at the time between the two best candidates who emerged from the process. One was Maire Bates a qualified solicitor with a practising certificate and the other was the late Dave Ellis who had huge experience of running a community law centre in London. The dilemma was did we want a solicitor who could actually represent clients in Court and advise them on their cases or did we want someone who would not be able to do that himself/herself but would have a huge educative role. In the end we offered the position to Maire Bates who became the second solicitor at the Coolock community law centre. Thankfully very shortly afterwards we were able to negotiate further funding and were able to employ Dave Ellis within a year or so, so that we had the best of both worlds.

The current scope and administration of the Act clearly focuses on individual casework and while the Board has not engaged in any educational campaigns with clients I think we could do more on this through modernisation of our website. If you look at other websites such as “Family relationships on-line” which I think is sponsored by the AG office in Australia that you can see the potential for disseminating good quality information on-line

through other information that is disseminated through the Family Mediation Service booklet.

### **The System We Work In**

The reality is that we work in a system which has really not been modernised. Discussing legal documents is all very confusing.

I recently told a client that I would draft a Civil Bill for Judicial Separation and that I would get working on the Affidavits of Means and Welfare. As there was an emergency element to it I said we would make an interim application for maintenance and that I would issue a Notice of Motion grounded on her Affidavit and exhibit various letters. She hardly understood a word. We speak a different language. It is about time that we used plain English and that we organised the Court documents in a simple way. I understand there was a project afoot with the Court Services some time ago but I haven't heard much about that project in the last few years. I had cause recently in a cohabitation case to work with a colleague in England who was making a claim under their Inheritance legislation for a client who had entitlements on the death of her long term partner. The document was very simple it was called a Claim Form. Claimant. Defendant. Details of Claim. Statement of truth. An English divorce petition is Pro Forma with various boxes with questions to be completed.

In Ireland we still regularly use Latin phrases, for example, *ex parte*, *traversed seriatim*, *pro tem*, *functus officio*, *res judicata*. In our documents we are “praying” for this and “pleading” for that. I checked on line and 94 students in Ireland took Latin as a Leaving Certificate subject in 2011. Latin was the official language of Ancient Rome. So no matter how much we like the Latin phrases and they are a useful shorthand for us but we need to drop the Latin and the legal jargon.

At a recent International Legal Aid Group conference there were very interesting papers on legal advice by phone not only to deal

with people who live in remote areas of Australia, Canada but also for emergency situations where people need some immediate guidance. The hot line has been very effective. There is also a move to give advice on-line. At the same conference we had an extraordinary presentation from Richard Cohen of EPOQ which sponsors My lawyer website. These sites provide a legal document service and telephone advice. Check it out. Also look at Rocketlawyer and Legalzoom. They are fascinating. While we must draft our court documents in accordance with the rules we can do small things to make them more understandable, plain English, short sentences, layout, headings.

### **Combining our Efforts**

Reading my Law Society Gazette for the month of May I noticed that there was an article about practising certificates and how many solicitors worked in the top law firms. Each of the top six firms had in excess of 130 solicitors working within them. Firm no 7 had 85. At last count the Legal Aid Board has over 100 solicitors thereby in effect making it the seventh largest law firm/legal provider in the country. There is an extraordinary wealth of experience in all our staff. While each individual client needs to be represented in accordance with the circumstances of their case a lot of work can be done to streamline the documentation we use, use plain English, use checklists for clients, notes explaining what happens in Court, what the Court expects of litigants, the sharing of this information between you is absolutely essential.

For example, I read in the newspapers some months ago that the Law Centre in Athlone? processed the first ever (known) dissolution of a Civil Partnership. I believe that experience should be shared, the documentation streamlined, any tips/traps highlighted as inevitably other law centres will come across these cases in the future.

### **Conclusion**

I look forward to hearing our other speakers discussing our topic for today and hearing your thoughts.

Dramatic change to the system we work in would be great. A big increase in our budget would be wonderful. Neither is likely any time soon but in the meantime we can continue to make progress on different areas and gradually make change.

Gathering factual and statistical information and figures is also key to change. For example, how many uncontested divorces did LAB do last year? How many hours went into each case. The Courts Service can also gather similar information. This would support the possibility that uncontested divorces could be processed in the District Court as mentioned by former Minister Shatter at the presentation last summer on family courts.

In relation to our budget, we have done well to hold it static (more or less) over the past several years when other budgets were being significantly reduced. We can and will advocate for an increased budget from our current Minister when we meet but we need to be able to say what we want and can do with it.

Finally I would like to take this opportunity of thanking you all for your hard work and commitment throughout the year. I know the effort everyone makes and it is appreciated. The new Minister in a letter I had from her recently asked to “convey her appreciation for the continued excellent work of the Board at a time of considerable challenges”. So I do. Thank you very much.