

## **Access to Legal Aid as part of access to justice: A rigid or discretionary right?**

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**By Noeline Blackwell, Director General, FLAC (Free Legal Advice Centres).**

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The recent discussion about discretionary health cards has revealed a fascinating underlying discussion about whether the right to access the health system when one is poor is one which should be rigidly confined on grounds of income or whether serious illness should qualify a person for free access despite the fact that they might be able to afford to pay part of that care themselves or alternatively are not designated amongst the poorest in the land.

In ways, it is akin to the debate on free or subsidised legal aid though, try as I will, I cannot imagine the same level of public outcry if there was a legal aid card similar to a health card and anyone tried to interfere with it. The need for health care is seen as something that is relevant in society. The need for legal care is often seen as something that only 'the other' will need.

The way we structure our legal aid system is an indication of what we have decided is important as a society. Since 1962, there has been statutory provision for legal aid in the preparation and conduct of a criminal defence where it is needed in the interests of justice because of the gravity of the charge or because of exceptional circumstances. However, this right to criminal legal aid goes deeper than that – it was recognised by the Supreme Court in the 1976 case of *The State (Healy) v. Donoghue* as a constitutional right.

As O'Higgins CJ said in that case: 'The requirements of fairness and of justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him. Where a man's liberty is at stake, or where he faces a very severe penalty which may affect his welfare or livelihood, justice may require more than the application of normal and fair procedures in relation to his trial.'

So the trigger in criminal cases for a full free service at an appropriate level of expertise and support for those who cannot afford to pay for that service themselves is the risk to liberty or something which may affect welfare and livelihood. This is needed in order to ensure justice.

No contribution is required at all. There is no fixed system to decide means. Although there is a means test, it is adapted to individual circumstances. We take the risk of loss of liberty that seriously and require our judges to inquire into each individual case and we depend on them to say whether it is proper to either award or refuse legal aid.

As became clear from the decision of the Supreme Court in the 2009 case of Carmody -v- Minister for Justice Equality and Law Reform & others, relating to cattle tags and the movement of cattle contrary to regulations imposed by the Department of Agriculture, the right to legal aid in criminal matters must be quite flexible and, while it won't guarantee that the accused person will be given resources equal to those of the State, nonetheless the court had to have discretion to award a higher level of legal aid than normal in a District Court case where such level was appropriate because the State was much better equipped to prosecute than the Defendant was to defend it in circumstances where a grave penalty could affect Mr. Carmody's liberty but would almost certainly affect his livelihood because of the number of offences against him.

This then is not unlike the access to health care which is given through the medical card system. The 'ordinary' medical card is available to anyone whose income is within the means tested limit. Once they get the card, they are entitled to access all appropriate levels of health care, thus giving them a substantive right to health care. This is not to say that the system is flawless – there are deficiencies in access to a timely and effective service – but at least the door is open to an appropriate service.

That hasn't given rise to recent debates. The issue that has been at the forefront is where people didn't fit into the means test limits. A pragmatic solution was in place. There was discretion in the health service to award a medical card when it was needed to give people the access they needed to our health system when coping with severe illness or disability. It was been instructive to see how the efforts to remove it or curtail it have created so much shock, anxiety and distress.

As a society, it was clear that we think that those who are very sick or those who are coping with substantial disability must be able to access appropriate health care with income being a secondary issue. People actually recognise that a right to health must involve access to the health care system. They also care that it exists.

There is now a group tasked with identifying which illnesses will qualify for the discretionary medical card. I do not envy them. Are they to distinguish between a terminal cancer and one which is curable? Are they to include or exclude intellectual disabilities? Are they to grade the loss of a limb against age related deterioration? How do they put in place a system that recognises individual need when there is so much pressure to make it rigid, inflexible and certain.

Returning to the issue of legal aid, rigid distinctions are drawn between what is rigid and what is discretionary.

In a criminal charge, the right to legal aid is invoked when a person cannot afford to pay for their own defence in circumstances where there is a risk of imprisonment but also where there are grave consequences to a person's welfare or livelihood.

Civil legal aid uses very different criteria. The result is that there are many issues which will have grave consequences for a person's welfare or livelihood but which will not attract a right to legal advice, assistance and representation if necessary.

A person will have to meet the totally rigid means test. They will have to show that the matter is within the Legal Aid Board's mandate.

The grave matter of the guardianship of children or the right of children to safety in their home will be covered but, except in very limited circumstances, the right of representation in eviction proceedings where the child will be left without a home will not be covered.

And yet, most people will agree that repossession of a family home or eviction of a family from their home are actions that have grave consequences for a person's and a family's welfare and livelihood.

Nor will the Legal Aid Board be adequately able to deal with the tens of thousands of people in arrears who are engaged in a shockingly unequal battle with their lenders. There are still about 80,000 principal family homes in arrears with an ever-increasing number in arrears for 2 years or more. The State is requiring lenders to either restructure the loans of all of these or realise their loss through repossession of the properties and through debt collection.

Each of these families is dealing with something with enormous consequences for their welfare, livelihoods and reputations. Each of them is facing into once-in-a-lifetime negotiations to preserve their homes or to reduce debt to a manageable level. Their discussions are in private without oversight with a lender which is a powerful commercial institution and is geared up with staff and processes – often chaotically implemented - to meet these state appointed targets and either restructure these loans in a way that suits themselves or to sue for repossession. According to the latest Central Bank figures, In the first quarter of 2014, over 3,000 repossession proceedings were issued for recovery of principal private homes. Add to this the 3,000 plus repossession proceedings issued in the second half of 2013 and we have a picture of a frightening number of family homes already at the crisis stage of risk, with many more coming behind.

There is little help available for these people. Many who are at work will not qualify for civil legal aid. Even if they do, either the various hurdles of the statutory scheme including how the merits test is interpreted, will exclude them or they may have to wait so long that assistance is not effective.

Even if they were to make a successful application for priority, that would in turn displace someone else who had waited for far too long for legal aid – something which might have to happen but which can hardly be called a solution.

The State, recognising that there is a problem, has put in place an entirely unsatisfactory scheme akin to giving legal aid after a court judgment has issued. It has brokered a deal with

lenders that if they offer a restructuring solution to someone, the lender will pay an advice fee to an accountant to explain the terms of the offer and the implications of the offer to the borrower. No one acting for borrowers thinks this is effective and a Departmental review of the scheme showed that few people had taken up the option of this limited advice; so few that the reviewers recognised that there was no point talking to those who had done so to see what they thought of it.

I am using the instance of people at risk of losing their homes with its consequent severe impact on their welfare including the risks to their family life, their health and their livelihoods because this area of unmet legal need is one which has occupied our time in FLAC over the years of this sudden and deep recession.

In fact though the failure to support access to law and to justice where there are grave risks to the welfare and livelihood of people pre-dates this recession induced need. The system devised for civil legal aid varied enormously from its criminal law cousin when it blankly and rigidly excluded certain areas of law and certain tribunals of adjudication from its remit. Included in this is the total lack of any system at all for legal representation at tribunals, where poor people quite regularly have decisions made against them that affect their welfare and livelihood in the most fundamental ways. I particularly refer to the lack of legal assistance for people attending social welfare appeals tribunals or employment appeals tribunals. In both, decisions can be taken based on complex legal constructions that are difficult enough for a lawyer to understand and that an applicant may not be able to articulate at all. Interpretations of European Union Law define how the habitual residence condition is to be understood in social welfare law as well as in family law. Many a poor employee has been forced to represent themselves in complex legal matters where their job or proper compensation for unfair dismissal due to indirect discrimination is at stake.

The rationale for denying legal aid is that these mechanisms are informal and that the tribunal itself will help. This however fails to recognise the complexity of the issues under consideration and that the impoverished person is faced with either an accomplished, experienced State mechanism or the massed might of a wealthy corporation represented by an expert human resources department, very often supplemented by an expert legal firm and junior and senior counsel. Even good adjudicators in those cases cannot be the answer – they can help a person better articulate their case but they cannot make the case for them. The outcome is unfairness and lack of access to justice in grave matters concerning the welfare, livelihood and reputation of people.

In FLAC, we have also watched with increasing alarm the rise in the number of people seeking to access the civil legal aid system even for its traditional work and the rise in delays in accessing the service. We have noted the additional pressures put on the system by the policy decisions of other departments, notably the pressure on legal aid to represent the parents of children where the State issues child care proceedings against them with a view to having the children taken into care.

Even given that we have dedicated experienced personnel operating an already established system; even given the cuts in budget that were perhaps milder than in other areas, the Legal Aid Board and its offices were going to be battered by the new assaults on the system.

At the height of the boom, in its 2005 report, FLAC had pointed out that the number of solicitors operating the civil legal aid system across the country was far too few with entire counties depending on one small legal office with perhaps two or three solicitors and limited case worker and support staff to accomplish their mission. When the strictures of recession economics were added to this, those existing staff suffered not only hits to their own incomes but also were limited in the budgets they had available to them to outsource work to private practitioners. In addition, employment control frameworks limited the capacity for sustainable and stable work forces in those offices.

It wasn't helped either by the reality that private lawyers around the country had much less capacity to take on some such work pro-bono or on a no-foal, no-fee basis because now they could not cross subsidise this work with other work. Nor did it help that the mainstay of the Board's representative work, family law disputes, became much more intractable when the sale of the family home no longer solved the main needs of the couple in dispute, let alone paid the fees of private lawyers doing the work.

What then do we find when we look at the right to legal aid in Ireland? We see that in criminal defence matters, where the interests of justice and fairness require it, where a person's liberty is at stake or the person faces a very severe penalty which may affect that person's welfare or livelihood, the State recognises that justice will sometimes require that free legal advice and representation is available to a person in the preparation and conduct of the case against them.

On the other hand we see that where the issue is not one of criminal defence, no matter how serious the case, no matter how serious the consequences, legal aid is only available where a person can slot themselves into a rigid entirely unflexible framework, mostly in the context of the Legal Aid Board mandate. As a result, many people who need legal advice and legal aid to have their voice properly heard do not get it.

Unlike the health system, where you can see someone in pain, the effect of not getting legal advice and legal aid is mostly invisible. The family negotiating with a lender cannot get a deal but no one really knows why; the person doesn't prove unfair dismissal because they didn't know how to structure that indirect discrimination argument; the person seeking social welfare doesn't even proceed with their appeal because they have no idea how they were refused in the first place and the State must be right. In this scenario, the risk of injustice is very high and this is not measured.

Looking at what has happened in the United Kingdom however, we do have to recognise that the historic lack of breadth in our scheme has meant that we don't have worry to the same extent as our UK colleagues. The level of cuts to legal aid there have been swingeing removing legal aid in most cases of family, housing, debt and welfare law. Because many of

these areas never qualified for civil legal aid here in the first place, they cannot be removed. It is instructive though to see that when UK lawyers are asked to describe the worst effects of the cuts, they regularly turn to the abolition of legal aid in housing and welfare cases on the basis that these are the cruellest hits that attack the most vulnerable in need of legal assistance.

Though the worst of the cuts in the UK were only introduced last year, the hauling back of legal aid has been going on since the economic crisis. Already, the court structures have identified problems. In a family law case this month, June 2014, Q v Q, Sir James Mumby, a senior family law judge has halted a case where a father, a convicted sex offender wants to maintain contact with his son and the lack of legal aid has emerged as a crucial factor which is affecting a fair hearing of the case.

According to a newspaper report of the case "It seems to me that these are matters which are required to be investigated in justice not merely to the father, but I emphasise equally importantly to the son, as well as in the wider public interest of other litigants in a similar situation to that of the father here ... there is the risk that, if one has a process which is not fair to one of the parents, that unfairness may in the final analysis rebound to the disadvantage of the child."

The reason for the cut backs is very straightforward. It is entirely related to cost. Legal aid is seen as too expensive. Therefore it should be cut back. The UK system was always more expensive than ours. It might well be that our policy makers have been quite relieved that our structures and systems for legal aid are capable of being confined. In criminal legal aid, the requirement is really controlled by the State and the number of prosecutions it brings. In civil legal aid, the budget is primarily for small legal offices with salaried staff. Once within the system, there is access to a substantial level of further legal service if needed, including the provision of Counsel. The budget is quite heavily subsidised by contributions from clients and occasionally the other party to proceedings which amounted to a quite significant sum of over €1.5 million in 2012 – the vast majority of this sum coming from the Board's civil legal aid clients rather than any other services available. The mandate of the Legal Aid Board is to operate within its government appointed budget which, as I said earlier, was always inadequate in FLAC's view. Costs therefore are eminently controllable. And above all, you can exclude people entirely from civil legal aid if they are as much as one euro over the cut off level.

Sir James Mumby's quotation referencing the risk to the rights of the child as well as the parents comes to the heart of the problem in relation to access to civil legal aid as a necessary part of access to justice, where it is required to ensure a fair hearing and a proper application of the law in circumstances where the outcome has grave consequences for those involved.

The current rigid system of legal aid can deliver certainty and can – with increasing difficulty – deliver a service in some limited areas of law. We all hold our breaths and cross our fingers hoping that this can continue – that spouses, partners and children at risk of

violence, abuse and neglect can continue to get the support that they need in order to have their voices properly heard in court systems that are often not the best way at all to deal with these issues. That is important and in particular, families already traumatised and in trouble should achieve better outcomes

But if the legal aid system put the human rights of those who need support in accessing law and justice first, then we should look at this somewhat differently. If we were to analyse it in accordance with international human rights norms, we would identify where the need existed, who was the most vulnerable, and how we could meet that need to the extent of the State's available resources. We would not go ahead with cases in court or elsewhere in situations where the absence of legal aid might oppress someone.

In her 2012 report on access to justice, made to the United Nations General Assembly, the UN expert on extreme poverty, herself a lawyer, Magdalena S epulveda pointed out – and I quote from the summary of that report - that

‘The limited ability of people living in poverty to access legal and adjudicatory processes and mechanisms is not only a violation of human rights in itself (ICCPR Art. 14), but is also the consequence of numerous other rights violations. The lack of remedies for the negative impacts of social policy in the areas of health, housing, education and social security, or for administrative decisions relating to welfare benefits or asylum proceedings, often results in inability to seek redress in cases of violations of key human rights, such as the right to equality and non-discrimination and the right to social security.

The generally complex normative framework of most formal legal systems, designed by the highly educated and often invoking technical jargon, often fails to recognize and account for the experiences, capacities and limitations of those outside the mainstream. People living in poverty, who have been denied the equal opportunity to benefit from education services, are thus de facto excluded from having recourse to legal remedies because of violations of their rights to education (ICESCR Art. 13) and information (ICCPR Art. 19).’

I would suggest that if there was an objective examination of who needs legal aid most in this land, based on the criteria set down in *The State (Healy) v O’Donoghue*, housing and welfare issues would feature in the cases that would be covered by civil legal aid. Legal aid would assist people trying to save their homes in debt negotiations. People would be helped where the technical scope of the case against them or the right they were trying to assert needed specialist help. People would continue to get help where their children and family lives were at risk. People with a disposable income over €18,000 would be helped when it was perfectly clear that without legal aid, they would be oppressed or their rights would not be vindicated. Such a legal aid scheme would be more discretionary than rigid.

Such a legal aid scheme would be more like the criminal legal aid scheme. Why is it that the civil scheme, which came after the criminal legal aid model was in place for some time, is so rigid, so unlike its discretionary predecessor? I venture to suggest that it is for the same

reason that civil and political rights get a warmer welcome in our courts than economic and social rights.

Our legal structure and system and those who design and operate it are much more familiar with civil and political rights – liberty, the right to vote, the right to due process – than they are with the social and economic rights to health, education, an adequate standard of living, social security. Coming from a particular legal viewpoint, civil and political rights appear more civilised, more controllable, less costly. That last of course is very challengeable when the full cost of the right to due process or liberty is scrutinised or when the impact of not supporting economic and social rights is taken into account. It may also be that civil and political rights seem more important and relevant in our system designed and operated in the main by those with less experience of the denial of social and economic rights or less risk of such experience in the future.

This then is to make the case that we have the tools and the constitutional thinking to put in place a civil legal aid system that would actually vindicate the right to civil legal aid as part of the right of access to justice. I say that we could do that by using the criteria we use to identify the need for legal aid in criminal cases.

Further, it is possible to do this even in the economic times in which we live. The economic constraints on the country do not dispense the State from its obligation to continue to protect, promote and to realise the fundamental human rights of the people of the land either immediately or progressively to the maximum extent of available resources. Even in times of economic hardship, rights must be protected in a way that is non-discriminatory. Thus this State, in this time, with all our economic woes, must ensure that it is vindicating the right of all of the people of this land to access justice in a non-discriminatory way including non-discrimination against people living with poverty.

Perhaps because everybody is vulnerable to the need for a functioning health system, the right to health is more regularly interrogated and right now, the right of access to the health system through medical cards is being interrogated. When does a similar exercise take place in relation to the right of access to justice and within that the right to legal aid?

One overdue step that we need to take is to identify what legal need should be met, is met and what is unmet in our State. Apart from Dr. Moling Ryan's doctoral thesis on the topic, I am not aware of other studies that try to identify unmet legal need in Ireland and no State study has been published. Such a study is necessary to gather the evidence of where the need is the greatest, and who is the most vulnerable to rights violations in our current system.

Our FLAC clinics across the country, providing a first stop basic advice service and our telephone line providing an information service, consistently over the last number of years provide a picture of family law accounting for one third of our queries, followed by debt queries at about 11-12% and employment law and housing law coming close behind. These are the things that affect people's welfare and livelihood. These are the things that we

believe people need access to advice and representation about. As currently constituted, the Legal Aid Board civil legal aid scheme takes the burden on family law but cannot address the other issues adequately and is sometimes prohibited from addressing them at all. The results of a study on legal need would give data and intelligence not just on how a legal aid system might apply but also on other aspects of the administration of justice which might be remodelled or reformed. However undoubtedly it would be a basis on which to establish if the right to legal aid as part of access to justice is vindicated in Ireland and if not, how it could be.

There is also the need for better early intervention. My guess is that most of those who work in the Legal Aid Board would say that those who seek civil legal aid come too late, too deeply embedded in crisis. This is why in FLAC we can appreciate why the Legal Aid Board has put in place early appointments and the triage system (the similarities with the health system continue) which then of course bring their own problems because there are no additional resources to carry out the triage. We also see the value of the closer linkage between mediation and law including the innovative and most useful referral between courts, legal aid and mediation provided by the Dolphin House project.

But it would be even better if some of those who find Dolphin House at the time they propose to issue proceedings didn't have to go there at all. Better knowledge of how to navigate the law and the legal and administrative systems that have to be navigated seems to be as important to a person at risk of legal conflict as good dietary information is to a person at risk of a heart attack. In a system where there is such pressure to deal with individual cases, it is hard to know where the time and the resources would come from. Further it is harder to measure the outcome. The person who has access to the information at an early stage and therefore needs no individual case taken is unlikely to hang around long enough to be a useful statistic. But nonetheless, it is always interesting to see how people with easy access to legal resources use them at much earlier stages than those who don't have that access, normally simply because they are poor. We believe in FLAC that access to appropriate legal information, applied to a person's own case is very powerful. Roughly half of the people who attend our volunteer clinics need no further information or referral on. So the delivery of applied legal information and advice at the earliest possible opportunity – including school programmes for delivery - is an important aspect of the right of access to justice where the Legal Aid Board could play a very significant role. I am aware that the Board has sought to identify greater streamlining between services not just in the Dolphin House Project but elsewhere and that efforts continue. There should be real encouragement of such initiatives at central government level.

The question of cost cannot and should not be avoided. At the moment the question that it seems that the State cannot answer satisfactorily is whether it is protecting the fundamental right of its people to legal assistance where necessary in cases other than those of criminal defence and, if not, if it is good enough to just allow that to continue.

So when we look at the cost of giving adequate legal aid then you have to look at the protection of the most vulnerable in our society. The Legal Services Bill is an opportunity to

look at that but in fact fails to address some key aspects such as the costs involved in delayed legal aid which increases the number of court appearances necessary, the cost to other parties not receiving legal aid, and the many delays and obscurities of how we run our court systems. If Legal Aid Board solicitors did not have to send a party to a matrimonial dispute off to another county and then attend court in that other county; if solicitors representing parents didn't have to spend a whole day in court without being called in a child care case; if more could be done electronically then there would be enhanced access to justice and indeed lower costs. FLAC believes that this Bill will not enhance access to justice at all for poor people unless this ignored aspect of the administration of justice is considered and reformed.

The cost of the system is also connected to a suggestion first made by Dr. Carol Coulter when she was conducting her research into the Family Law Courts a few years ago. This suggestion was that the rigid means test which denies anyone with a discretionary income of over €18,000 any access to most legal aid be abandoned and instead, that access to legal advice and assistance be made available to those who need it to access justice with those participating paying a contribution according to the person's or the family's means, fairly assessed. FLAC made a different suggestion in our previous report where we suggested that rather than an inflexible cut-off point, there be graded access for higher incomes. Either of these, or a variation of both, avoids the situation that now exists where people have enough income to live but do not have enough to engage legal advisers and as a result, they are disadvantaged and their rights of access to justice are not protected

I will end this paper with a quotation from FLAC's 2005 report which unfortunately still applies:

'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 of equality before the law; a right guaranteed by Irish constitutional law and international human rights law.'

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