

Ladies and Gentlemen,

## **1. Introduction**

It's a great privilege and source of pleasure for me to have the opportunity as Chairperson of the Legal Aid Board to speak at today's Conference. Days like today cause me to reflect on the missionary zeal many of us had back in the 1970s (and hopefully haven't lost) as we campaigned for a comprehensive civil legal aid system when we involved ourselves in the then fledgling legal advice service that was FLAC, the Free Legal Advice Centres. The progress made in the meantime has been quite staggering and I am in the quite unique position of being involved in legal aid throughout that period in three separate roles: that of campaigner, practitioner and, now, on the inside as Chairperson of the Legal Aid Board. I've had the benefit of an insight and experience not offered or available to all.

This experience also means that I am in the position to offer heartfelt appreciation to people who have contributed wonderfully over the three decades of availability of civil legal aid in Ireland. Successive Ministers, including the current Minister for Justice and Law Reform, have been very supportive of the Board in its work. So too have many senior civil servants in the Department.

A great number of people have served the Legal Aid Board extraordinarily well over the past three decades. I think of my distinguished predecessors as Chairperson: the late Miss Justice Mella Carroll, Vincent Landy SC, Mr. Justice Nial Fennelly, Clare Connellan and the late Eamonn Leahy SC. We have been very fortunate too in the legal and lay membership of successive Boards. I have been particularly fortunate with the membership of the current Board, in which there is a very strong sense of commitment to access to civil legal aid, and also of collegiality and comradeship.

Of crucial importance has been the dedication of the staff of the Board: thirty-three law centres across the country covering civil law and asylum law matters. A number of the solicitors recruited by the Board thirty years ago are with us today and I am delighted to welcome them. Thanks also to the three CEOs who have served in that period (Pearse Rayel, Frank Goodman and Moling Ryan), with two of whom I have had the privilege and pleasure of working. Thanks too to all those barristers and solicitors in private practice who have supported the work of the Board in such an assiduous fashion.

## **2. Coverage**

In my time addressing you today I would like to explore two areas that I feel are important in any meaningful discussion on legal aid. The first area is the extent to which there continues to be a valid case for a State supported civil legal aid programme. When looking at this area I don't propose confining myself to the access to justice argument. I will also ask if there is a concrete or financial argument for the State to continue devoting resources to legal aid.

My second part of this presentation will look to the future. Are there better means of providing legal aid? Should a more integrated approach to publicly provided services, notably legal aid and related public services, be taken? Should there be greater emphasis on alternative dispute resolution (ADR)? How can we better deliver the services that are needed by our clients?

## **3. Case for Civil Legal Aid**

The term 'access to justice' is one that has been used to an ever-increasing extent by a range of groups and individuals seeking to advance specific issues or causes. The meaning of the term has perhaps become clouded and is often spoken of as a truism attaching to all types of cases. At the outset it's useful to reflect on the term and what it means. Two respected researchers<sup>1</sup> some thirty

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<sup>1</sup> Cappelletti and Garth (1978)

years ago noted that the term is not easily defined but that it serves “to focus on two basic purposes of the legal system – the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. First, the system must be equally accessible to all, and second, it must lead to results that are individually and socially just”. But the term has not been static. Originally, the term was associated with the formal right to litigate or defend a claim. This has developed in recent years – and this is something I will return to later – as a vast new swathe of rights has been developed in a range of areas: welfare, education, health etc. This new understanding recognises that the possession of rights is meaningless without mechanisms for their effective vindication.

Vindication of rights is inevitably easier for some sections of any population than others. The most common barrier faced by certain sections of the population is, inevitably, the cost associated. The Committee on Civil Legal Aid and Advice (the Pringle Committee) in 1977 found 4 factors which they said “appear to deter poor people from seeking the service of solicitors”: the belief that cost will be beyond their reach; lack of knowledge of the types of service and doubt about the relevance to their problems of the services of solicitors; the psychological barriers between socially underprivileged persons and solicitors; and difficulty in reaching solicitors’ offices. More recent international studies confirm the perceived barriers as including cost, delay, complexity and a range of subjective and psychological barriers such as language, education, formality etc.

The importance of equality of access to justice for all citizens has been recognised almost universally and the response has been invariably the establishment of a state funded legal aid system, given the acceptance that in the legal system prevailing in most countries, legal services are necessary in order to provide access to justice. The underlying aim has been that “anyone with a legal problem has equal access to its just conclusion so that disputes are determined by the intrinsic merits of the arguments of either party, not by

inequalities of wealth and power”.<sup>2</sup> Modern notions of equality demand that all citizens have equal and effective access to justice and without such a basic foundation, law and the state would not be in a position to secure legitimacy among citizens.

It's interesting for me as a lawyer to note the extent to which the landscape of rights and obligations has changed in the 30 years since the establishment of the Legal Aid Board. When I and so many fellow students were campaigning in the 1970s we saw the greatest need in the area of family law and, indeed, this continues to be the area of greatest demand in common law countries. Since then we have seen a far more complex and interwoven series of rights and obligations emerge in areas such as education, employment, housing, welfare and children and new areas of civil law areas such as consumer law. There are, however, a number of matters which are even more intriguing and which make the issue of meaningful access to justice even more pertinent.

Firstly, research both here and internationally has found that we can clearly predict the extent of vulnerability of certain groups to particular types of legal problems. People on low incomes, people renting from private landlords, unemployed people, single mothers, those with low educational attainment, those born outside the country, disabled people and others are vulnerable to particular types of problem which can be anticipated and predicted. It is also possible to predict the likelihood of problems impacting at certain stages of people's lives. with the corollary that people who are better off, have better educational attainment, have no problems with language etc. have less difficulty in dealing with the legal problems they encounter.

A second issue is the extent to which experiencing one type of problem can lead to or be associated with another type. Thus, for example, people experiencing employment problems are also quite likely to experience money,

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<sup>2</sup> Legal Action Group (2005)(England and Wales)

consumer or housing problems. People involved in divorce proceedings have a considerable possibility of experiencing family problems, problems to do with children and money problems during the same period. This is what is known internationally as the 'clustering' of problems. As Dame Hazel Genn, one of the foremost authorities on the area, has remarked: "problems and misfortune have a tendency to come in clusters". The experience of legal problems has an additive effect in that each time a person has such a problem they become increasingly likely to experience additional problems. From an access to justice perspective, the concern again is the vulnerability of certain sections of the population, notably those coming within the ambit of legal aid, to encountering and being able to manage these problems. As the 2007 report of the Public Legal Education and Support Task Force in England and Wales, chaired by Professor Genn, pointed out: "The burden of unresolved legal problems falls more heavily on the socially excluded". Hence, the rationale for State intervention through legal aid.

There is, as in all jurisdictions, a cost associated with providing legal aid. Yes, it is confined to those who meet both financial and merits criteria. The financial criteria for the provision of legal aid were last reviewed here in Ireland in 2005, with new regulations introduced in 2006. With the downturn in the economy, greater unemployment and the pressure on wages and salaries our research suggests that some 50% of the population is eligible for civil legal aid with about 30% eligible to pay only the minimum contribution. (We will be hearing in the afternoon of the experience in Scotland where the percentage of the population now eligible for legal aid is close to 80%). It costs about €26m currently per annum to provide civil legal aid in Ireland with a further €8m (reducing) towards legal aid in asylum cases. Legal aid does not come cheap but it would be a mistake, in my view, to limit one's perspective on legal aid to those figures only. There has been a move in some countries in recent years to consider whether, in fact, there might be a business case for legal aid.

Let me start by looking for a moment at the consequences of a client coming up against a problem with a legal dimension. There is a danger for legal professionals particularly and, indeed, for the better off and better educated to not fully appreciate what these actually are or can be. Research both here and in other jurisdictions point to the adverse consequences of experiencing the type of problems we in the Legal Aid Board are responding to on a daily basis. Almost half of all people experiencing such problems reported adverse consequences including physical ill-health, stress related problems, loss of income or employment, violence or damage to property, breakdown of relationships and even loss of one's home. These are indeed considerable consequences. But not alone are they considerable, they also have a potential downstream cost in terms of relationships, finance and even society if not managed effectively at an early stage. The figures can be quite staggering. Ministry of Justice economists in the UK estimate that, over a three and a half year research period, unresolved law-related problems cost individuals and the public purse £13 billion.<sup>3</sup>

A more recent Paper presented to the Legal Services Research Centre's International Conference in Cambridge (July 2010)<sup>4</sup> looked at the empirical basis (in England and Wales) for demonstrating a business case for civil legal aid and reviewed the evidence based on the economic value of advice. Factors considered in the study included homelessness prevented, poor health outcomes averted, work productivity and client financial gains. The findings included:

- For every £1 of legal aid expenditure on housing advice, the state potentially saves £2.34.
- For every £1 of legal aid expenditure on debt advice, the state potentially saves £2.98.
- For every £1 of legal aid expenditure on benefits advice, the state potentially saves £8.80.

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<sup>3</sup> LSRC Research paper no. 14, Pleasence et al (2006)

<sup>4</sup> *Towards a Business Case for Legal Aid*. Paper to the LSRC's 8<sup>th</sup> International Research Conference, Cambridge, July 2010 – See U.K. Citizens Advice website

- For every £1 of legal aid expenditure on employment advice, the state potentially saves £7.13.

It is clear that failure to resolve the more serious problems in a speedy and equitable manner creates considerable adverse consequences both for the individuals involved, their families, their working and social lives and, ultimately, the State. There is no reason to doubt that the same consequences with the same associated costs (relative to our population) apply in this jurisdiction also.

It is also worth noting that many other jurisdictions such as the U.K., the Netherlands and Australia invest in research and the collection of relevant data in legal aid and associated socio-economic areas, resulting in better focussed and more effective delivery of public services. Against the background of an annual current spend of close on €100m on civil and criminal legal aid together in this jurisdiction, we must ensure that we are getting the best and most efficient value for the taxpayers' money by developing policies based on sound data and empirical studies in the area.

Let me, therefore, sum up the continued rationale for an effective system of state supported legal aid:

- Effective and equal access to justice is one of the key hallmarks of an egalitarian legal system. A state-funded legal aid system is central to achieving this.
- A considerable proportion of the population has greater difficulty in defending or vindicating their rights. This can be due to a variety of factors. A legal aid system is critical in addressing this societal problem.
- Life has become far more complex and dynamic. New rights and responsibilities have been created by successive governments. The capacity of a proportion of the population to understand the law and use the legal system effectively is constrained. Legal aid can and does help to bridge the gap.

- There is a strong business case to be made for civil legal aid in that the downstream costs for unresolved legal problems can be huge.

#### **4. Legal Aid: Looking to the Future**

The second and final part of this presentation looks at my personal perspective on how I see civil legal aid evolving and the sort of focus it might have in coming decades. I would like to address perhaps just three areas:

- The benefits of a move in appropriate cases away from the adversarial environment of the courts and towards an alternative dispute resolution methodology, whether it be collaborative law, mediation, arbitration or other.
- A greater integration of public services, including legal aid, which focuses on the holistic need of the client rather than on the specific remit of individual organisations and Departments.
- A greater focus on the targeted provision of information, which seeks to simplify life for the citizen in terms of both rights and responsibilities.

##### **4.1 Alternative Dispute Resolution**

I have spoken on a number of occasions over the past few months and written in the Irish Times about the scope for mediation and other forms of alternative dispute resolution as more effective means than formal court hearings of resolving disputes in many situations. There has been increasing recognition and support for such alternative approaches in recent years. The Chief Justice recently noted “a too casual recourse to litigation not only as a first but also as the only option”. He saw mediation as reducing the burden on the parties concerned, personally and economically, as well as a saving for society both in terms of legal costs and in reducing the burden of costly courts systems, allowing them to function more effectively. The Minister for Justice and Law Reform too has indicated support for approaches other than litigation. When speaking at the 2009 Law Reform Commission Annual Conference he said: “I

readily agree with the (Law Reform) Commission's view that litigation must always be regarded as a last resort and that the legal system must be framed in a way that supports alternative dispute resolution.....". There is a growing use of alternative dispute resolution both in this country and internationally as an option available to help resolve civil disputes. In many cases, the agreement reached through ADR has offered a speedy and lasting resolution of a dispute and has kept the matter from the courts. Mediation always has the potential to save on court time and legal costs and that is why rules of court, for example, continue to be developed to facilitate adjournment of proceedings in our courts to permit mediation. It is my view that the future lies with a more structured approach to mediation than exists at present in our legal system.

The Legal Aid Board is mindful of the negative impact that the court process can have on the family dynamic where relationship breakdown has occurred. A very large proportion of the over 16,000 cases our law centres handled in 2009 were in the area of family law. I referred earlier in my presentation to the extensive research from many other countries showing that people's experience of 'justiciable' problems is known to have profound impact on both their physical and mental health, suggesting not just personal but also societal impact. Problems, notably family law problems, are rarely single-faceted and thus may not be most effectively addressed through the courts system.

Apart from the benefits for our clients that a higher concentration on mediation and other ADR approaches might have, there may also be efficiency benefits to the Board, allowing us to assist greater numbers of clients. In England and Wales it has recently been estimated that the cost of certain cases is reduced by about one third, and the time taken to finalise cases can be reduced by three quarters if their clients use mediation. However, our concern is to do what is the right thing for our clients, given their own personal circumstances.

Patricia Rickard Clarke of the Law Reform Commission will be speaking later this morning and I'm sure she will make reference to the Commission's 1996 report on Family Courts in which they advocated a shift in emphasis away from the adversarial process and towards mediation, and reiterated these proposals along with others in its Consultation Paper on Alternative Dispute Resolution in 2008. It is now almost fifteen years since the initial report, which made very important and progressive proposals, some of which have not been implemented at all, and many of which are only recently coming to be implemented in Rules of Court and in legislation. How many lives of people involved in family disputes could have been made less traumatic if such proposals had been enthusiastically seized upon by those responsible, and legislated for during that period?

I am firmly convinced, and this is a view shared by a great number of people both here and in other jurisdictions, that access to justice does not necessarily mean access to a court hearing or a court process. I share the belief that most users of the civil justice system want their cases resolved justly and with the minimum of delay and they would prefer to avoid a formal court hearing if at all possible. Court hearings can entrench positions, harden attitudes and lead to lengthy alienation to the detriment not just of relationships between parties but, notably, to any children involved.

There have been considerable developments in mediation and alternative dispute resolution as a means of addressing and resolving disputes both here and in other jurisdictions and I don't propose to address these in detail. The Legal Aid Board is currently working with the Courts Service, the Family Support Agency/Family Mediation Service with a view to putting in place a pilot tripartite approach to mediation based around the family law District Courts in Dolphin House in Dublin, and I am very optimistic for the success of this venture. Interestingly, the project has received the active backing of the President of the District Court and the Family Law judges in Dolphin House.

We have also put considerable resources into training our solicitor staff and other legal professionals in other forms of ADR, notably collaborative law. I feel

this emphasis is very much consistent with the views expressed by the Chief Justice and the Minister. It must be better for parties and society if any avenue which serves to diffuse the greatest possible amount of conflict, without recourse to formal legal institutions, is utilised to best effect.

#### 4.2 Integration of services

Many of you will have gathered from what I have said already that I am firmly of the view that the inter-related nature of so many legal problems experienced by individuals cannot effectively be responded to by individual public service organisations or NGOs taking a uni-dimensional approach to resolution. A client may present himself/herself to a solicitor indicating that there has been a marriage breakdown with his/her spouse. The traditional approach may have involved moving to initiate separation or divorce proceedings. The client may, however, be confronting a whole series of issues which may not be wholly resolved by such a process, or this approach may take an inordinate amount of time for resolution of issues that could involve housing, access to children, debt, welfare and many more to be reached. Some of the problems may be solved but others created through the legal process initiated. Hence the downstream costs I spoke of earlier which may be carried by the individuals concerned, their families, Government Departments and offices, and society. Some costs may be immediate; others long-term.

This appreciation is what has driven the mediation initiative I spoke of earlier involving the Courts Service, the Family Support Agency/Family Mediation Service and the Board. It is also what drove our thinking when we sought to put in place a community-wide services initiative in Ballymun two years ago which, unfortunately, has so far failed to come to fruition for a number of reasons.

One initiative I have been particularly impressed with in an international context is the co-ordinated approach that has been in place since 1978 in West Heidelberg, a disadvantaged northern suburb of Melbourne, Australia. For more than 30 years legal services are provided in the local community as part of an integrated service incorporating health and welfare matters also. Some

key elements of this integrated service that facilitated an effective working relationship and positive outcomes for clients and the community include: co-location; staff willingness to work together; professional experience of staff; understanding by the staff of the respective roles of different disciplines; clear and prompt attention to referrals; and clear and frequent communication on cases.

I believe that a greater focus on the client in the provision of public services, including legal services, suggests a benefit in a greater integration of related services.

#### 4.3 Provision and Availability of Information

Most public service organisations, including the Board, are assiduous in the production and dissemination of relevant information relating to processes, steps required, responsibilities, costs etc. in the body's work. Leaflets are developed and made widely available; websites are produced and constantly updated with similarly extensive information; public offices exist where people can go with their issues or problems; and telephone helplines are put in place. The Citizens Information Board has a great number of offices around the country and does an excellent job in offering information on all types of issues. And yet the information landscape can be hugely confusing for a great number of people when they encounter a problem with a legal or/and a public sector dimension.

We have no national figures in this country to support my contention but research produced in the UK in May of this year offers some indication of the type of problem confronted. Research published by the Public Legal Education Network<sup>5</sup> there found that 65% of the general public do not know their rights at the time when they experience a problem, and 70% of people are not aware of any formal processes relating to their problem. Around 50% of people experiencing problems look for advice from a range of sources; about a third try to handle the problem on their own; and the rest do nothing. Knowledge

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<sup>5</sup> *Knowledge, capability and the experience of rights problems*. Balmer, Buck, Patel, Denvir and Pleasence

and awareness of rights (and responsibilities) and the appropriate response can be critical to speedy and effective resolution. I have referred earlier to the physical, mental and social costs associated with the lack of such knowledge and awareness. Hazel Genn in an address to the English Law Society in 2009 identified the fundamentals of access to justice as:

- An awareness of rights, entitlements, obligations and responsibilities;
- An awareness of procedures for resolution;
- The ability effectively to access resolution systems/procedures; and
- The ability to effectively participate in the resolution process to achieve just outcomes.

I feel there is considerable scope to address the issue of access to justice to the benefit of individuals and society and I welcome the current work the Board is engaged on with Citizens Information, Family Support Agency, Equality Authority, FLAC and other bodies.

## **5. Conclusion**

I set out in this presentation to address two issues: to review the concept of access to justice and the importance of legal aid as the State expression and response to the difficulties faced by a sizeable percentage of the population; and, secondly, to offer some personal views as to how we might as a society, with no extra cost, improve the lot of the same people. After spending a considerable number of years in the legal arena as student, campaigner, practitioner, Board member and Chairperson of the Legal Aid Board I am absolutely convinced of the real and sustainable value of civil legal aid as both a social and societal imperative. I feel too that legal aid is just a single, albeit critically important, response to social inequality. A more holistic and client-based perspective on the part of all public services is likely to offer even greater benefit.

I will end with what is undoubtedly a particularly apt quotation for Irish civil legal aid, from the European Court of Human Rights in the Airey case, the

catalyst for the introduction of State provided civil legal aid in Ireland. The Court said in referring to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) that “It is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”. I think you will agree that we should consistently hold this measure in the forefront of our minds when devising and implementing policy for legal aid into the future.

Thank you.