

Opening Statement by Community Law & Mediation

Wednesday, 11 December 2019

Introduction

Good morning chairman and members. We are delighted to be here today with our colleagues in the Mercy Law Resource Centre and Professor Gerry Whyte and I would like to thank the Committee for the opportunity to speak.

I am the CEO of Community Law and Mediation (CLM). We operate two community law centres in Coolock and Limerick and currently assist more than 3,000 people every year through our range of services, which include free legal advice & representation; information & education; and mediation & conflict coaching.

The Community Law Centre Model

I think it is fitting that CLM have been invited to present our views on the issue of access to justice given our origins. CLM, originally known as *Coolock Community Law Centre*, was established in 1975, as the first, independent, community-based law centre in Ireland. It originally served as a prototype of the Neighbourhood or Community Law Centre that could underpin a nationwide civil legal aid scheme, which did not then exist.

The Community Law Centre Model, under which CLM operates, has a number of important characteristics:

1. Firstly, our services are free and embedded in the community, making them as accessible as possible. Many of our information talks and legal advice clinics are delivered on an outreach basis in locations where the community is already congregating e.g. in community organisations, public libraries and parish halls. Also, local organisations and interest groups are represented on our Board and Advisory Committees to ensure our services are responsive to and shaped by the needs of the community.
2. Secondly, community education is a critical part of our work. Access to justice begins long before anyone steps inside a courtroom, it begins with creating an awareness of rights and the law so that the community are more empowered to use the law to enforce those rights. In CLM, we often encounter a lack of awareness of how the law can assist in situations of homelessness or refusal of social welfare, issues that are critical to social inclusion as they most affect a person's ability to participate fully in society.
3. Thirdly, the community is empowered to use the law through our legal advice and representation service. CLM currently partners with other organisations to provide

over 180 outreach legal advice clinics per year, around the country, and our legal representation work is focused on areas of law which disproportionately affect those living in disadvantage or which are not catered for by the State's Civil Legal Aid Scheme – these include employment, equality, social welfare, debt, education and housing.

4. Finally, CLM campaigns for law reform, and for the safeguarding of rights already enshrined in law. Our priorities for law reform are directly linked to the issues being raised by the community at our clinics.

Importance of Access to Justice

The right of access to justice is accepted as a constitutional principle and a right under the European Convention on Human Rights. Without it, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable. It is a basic tenet of a functioning, democratic society

In the absence of access to justice, challenging incorrect decisions or unfair practices by an arm of the State or other bodies would be more difficult, more distressing or just impossible particularly for vulnerable groups or at vulnerable times.

Access to justice is vital for social inclusion and much of CLM's legal services are focussed on areas which are critical to social inclusion e.g. preventing homelessness, assisting with accessing social welfare, education and other services, preventing job loss and challenging discrimination.

Currently, the right of access to justice is being denied to many. Susan Gogan's research on unmet legal need in Ballymun in 2005¹ showed that 76% of those with legal problems had sought help but were unable to obtain it. Furthermore, the community consultation process during the set-up of CLM Limerick in 2012² showed that community organisations rated the availability of legal services to their clients as *not good/bad* and they had very limited expertise in the area themselves.

In my presentation today, I will briefly address the following three points:

1. The barriers to accessing justice;
2. The limitations of civil legal aid and suggestions for reform; and
3. Structural barriers within the legal system itself.

¹ Law from a community perspective-Unmet Legal Need in Ballymun-Susan Gogan 2005.

² Community Consultation Report-Unmet Legal Need in Limerick, Community Law & Mediation, 2012.

<http://www.communitylawandmediation.ie/fileupload/CLM%20Limerick%20Consultation%20Report/LCLMC%20Community%20Consultation%20Report-Unmet%20Legal%20Need%20in%20Limerick%20Final.pdf>

1. Barriers to Accessing Justice

The barriers to accessing justice were first identified in Ireland by the Pringle Report published in 1977 and its conclusions were echoed in a report compiled by CLM in 2012, some 35 years later.

These reports acknowledged that the obstacles facing those living in disadvantage, in need of legal services, are not just cost and include:

- Intimidation of the legal world;
- Inaccessibility of legal services;
- Lack of awareness of rights and the law most relevant to disadvantaged communities including amongst the legal profession;
- Fear of not being taken seriously or of retaliation if legal action is taken; and
- Time, including waiting times for legal aid and the time it takes for a case to be heard.

Our practical experience is that these factors deter people from accessing legal services and that the best way to break down these barriers is through meaningful community engagement along the community law centre model.

2. Limitations of the Civil Legal Aid Scheme and suggestions for reform

A crucial element of access to justice is the effective availability of the services of a lawyer. For those who do not have the means to access a private legal service, the right to legal aid is an essential component in securing their right of access to justice.

The Pringle Report in 1977, together with CLM's 2012 Community Consultation Report and Susan Gogan's 2005 research, recommended that a civil legal aid scheme should offer legal representation for all types of civil proceedings and should have a legal education and law reform function.

However, the Civil Legal Aid Scheme, established in 1979, falls far short of these recommendations and as a result, fails to adequately provide for access to justice. This is due to a number of factors, many of which were highlighted here by FLAC two weeks ago. These factors include:

- a. The statutory limitations of the Civil Legal Aid Scheme. There is no logical reason why the availability of legal aid should be determined by area of law rather than need or why tribunals, such as the Workplace Relations Commission or Social Welfare Appeals Office, should be excluded from legal aid. When an individual's job or welfare payments are being threatened, it has the potential for significant adverse consequences not just for that person but also for their family.ⁱ

- b. An overly strict means test which is out of touch with the reality of the cost of living and which result in people on low incomes, who cannot afford a solicitor, being denied legal aidⁱⁱ.
- c. The under resourcing of the Legal Aid Board resulting in an average waiting time for first consultation in Dublin of up to 38 weeks, and up to 58 weeks in Finglas. This is simply too long to wait and can cause issues for those seeking legal remedies with strict time limits such as Judicial Review, which has an effective time limit of three months.
- d. The current model of legal aid cannot be seen as adopting a comprehensive approach to the provision of civil legal aid as there are no links with disadvantaged communities and there is no law reform or education element.

There is further detail provided on these factors in the Notes section of our Submission.

The problems and limitations of the Legal Aid Scheme raise the question as to whether the State has complied fully with its obligations under Article 6 of the European Convention on Human Rights and, in cases involving European law, the EU Charter of Fundamental Rights and Freedoms, as there are most certainly people of limited means who have complex legal issues and are unable to obtain legal aid from the State.

Before I conclude discussing the Legal Aid Board, it is important to state that despite the limitations and under resourcing of the service, CLM's experience of working with Legal Aid Board staff and management has always been very positive and in fact, John McDaid and Catherine Ryan recently delivered talks as part of CLM's community education programme.

3. Structural barriers within the legal system

In addition to the effective availability of the services of a lawyer, a crucial element of access to justice is effective access to the courts themselves.

There are several barriers to accessing the protection of the courts which include the cost of filing fees, the complexity of the language used and the intimidating atmosphere of the courts themselves.

In particular, the courts system, as a whole, is not designed to cater for children or people with particular vulnerabilities or complex needs. To give an example, we recently represented a man with physical and intellectual disabilities before the District Court. He had difficulties with communication and comprehension and neither the barristers nor the judge appeared to have any guidance to follow on how to approach questioning him. His case was significantly hampered as a result. A further issue in this area is the delay in implementing reforms contained in the Assisted Decision-Making (Capacity) Act 2015. These reforms will help to ensure that people, whose decision-making capacity is impaired, are afforded the fundamental human right to make their own decisions, as far as

possible, about their personal and financial affairs. At the moment, however, the Victorian concept of Wardship still applies through the Regulation of Lunacy (Ireland) Act, 1871.ⁱⁱⁱ

As a community law centre, we also encounter obstacles to taking public interest cases such as the absence of a class action mechanism, restrictive rules in relation to locus standi and fear of costs. We often meet with clients who have made a decision not to take a case to vindicate their rights because of the fear of a significant costs order should they lose their case. This occurred recently in CLM in relation to a woman who had a very strong legal case, which raised broader public interest issues, in relation to the discriminatory provisions of the State Pension Scheme.

Apart from changes that need to happen, there is currently a threat to access to justice in the form of the proposed Housing and Planning Development Bill 2019, which I understand is due to be debated early in the New Year. If enacted, it will increase costs exposure and make it more difficult for ordinary citizens and environmental NGOs to achieve the necessary legal standing to take cases challenging decisions which have an impact on the environment. Environmental democracy and oversight is protected by EU Law and the Aarhus Convention and has never been so important as we grapple with the challenges posed by climate change.

Recommendations

In conclusion, CLM recommends the following:

1. Restructure the Civil Legal Aid Scheme in line with the community law centre model to include a public legal education and law reform function. In the interim, greater funding security should be ensured for community law centres, such as CLM, who continue to meet the need arising from the gap in services;
2. Review the Civil Legal Aid Scheme to ensure that it is properly resourced and is provided on the basis of need, rather than areas of law and that the financial means test is more inclusive; and
3. Ensure effective access to the courts by examining issues such as accessibility; cost; class actions; locus standi and protective costs orders, bearing these matters in mind with the proposed Housing and Planning Development Bill.

Finally, I would like to conclude by paraphrasing American Attorney, Kimberly Motley, ‘the laws are ours...they belong to us and they need to be used’. If people don’t know about their rights under the law, don’t know how to assert their rights or are not able, without legal assistance to do so, then those rights are not being protected.

Notes

ⁱ Statutory Limitations of the Civil Legal Aid Scheme: While legal advice is provided by the Legal Aid Board in most areas, legal representation is limited by statute. The 1995 Act

designates certain areas outside the scope of the Scheme including: defamation, disputes over land, small claims, licensing, conveyancing, election petitions, and class actions. In theory, there is no reason why civil legal aid should not be available in areas which have not been specifically excluded by the 1995 Act e.g. housing law or access to education.

However, it is our experience that this is not the case and this is reflected by the fact that 71% of Legal Aid Board cases last year were in the area of family law, 10% related to international protection; 9% related to the *Abhaile* scheme; with only 10% relating to all other civil matters

Legal aid is further restricted by the fact that the only tribunal in which legal representation can be provided is the International Protection Appeals Tribunal. This means that you cannot apply for legal aid for employment and equality cases before the Workplace Relations Commission or appeals to the Social Welfare Appeals Office. Employment, equality and social welfare law can be complex and technical, the cases in these areas are critical to social inclusion and disproportionately affect disadvantaged communities and the clients that we assist in these areas are often vulnerable. In relation to the Workplace Relations Commission, while the intention was to remove the need for lawyers from the workplace disputes process, it is our experience that, in practice, employers tend to turn up with legal representation which creates a real cause for concern from the point of view of equality of arms and natural justice.

It should also be stated that the Scheme is limited to natural persons and therefore Environmental NGOs, often operating within very limited means, are precluded from applying for legal aid.

ⁱⁱ Overly strict means test: While the Civil Legal Aid Scheme is subsidised, there is a strict means test and if a person qualifies, a sliding scale of fees are charged, depending on income, with a minimum floor. To qualify for civil legal aid and advice, a person's disposable income must be below €18,000. While there are certain allowances against income, these have not been reviewed in some time and should be reviewed, going forward, on an annual basis. For example, the maximum allowance for rent/mortgage payments is €8,000 and child care facilities is €6,000 per child regardless of where the applicant resides. This is out of touch with the reality of these costs particularly in larger cities. Also, a significant anomaly is the fact that Housing Assistance Payment is treated as income despite the fact that it is paid directly by a local authority to the landlord. In many counties, HAP exceeds the €8,000 maximum allowance for rent/mortgage payments. This means that for some, being in receipt of HAP affects their financial eligibility for civil legal aid. The overly strict means test results in people with low incomes who cannot afford a solicitor but who also do not meet the current thresholds for free legal aid.

ⁱⁱⁱ Since the Assisted Decision Making (Capacity) Act 2015 Act was approved, more than 1,250 people have been made Wards of Court, including 316 so far in 2019.