

**CLM Submission to the Law Reform Commission on possible projects for the
Fifth Programme of Law Reform**



Community Law & Mediation

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About Community Law & Mediation

CLM is an independent, community-based organisation that works to empower individuals experiencing disadvantage by providing free legal, mediation and information services. At a national level, we seek to have a wider impact through our campaigns for law reform and by acting as a resource for other advocacy organisations.

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Introduction

The Law Reform Commission (LRC) is currently preparing its Fifth Programme for Law Reform and as part of that work, has invited submissions on possible projects in areas of law that may be in need of reform and modernisation. This is Community Law & Mediation's submission to that process.

The last LRC programme for law reform consultation took place in 2013. Since then Community Law & Mediation (CLM) has established a second Community Law Centre, Community Law & Mediation Limerick to address the significant unmet legal need in the Limerick area. This expansion, along with the continuing aim of CLM to improve access to justice, informs the content of CLM's submission.

CLM works to tackle barriers to justice and to highlight and challenge the disproportionate effect of unfair laws and policies on certain groups in society primarily in the areas of housing, employment and social welfare law. This submission therefore suggests that the LRC undertake a project relating primarily to the concept of access to justice and carry out an in-depth analysis of the current Civil Legal Aid Scheme as set out in the Civil Legal Aid Act 1995 with a view to examining whether the Scheme complies with the European Convention on Human Rights.

The submission also advocates for an analysis of issues specifically relating to access to justice namely; legal aid for those who lack sufficient resources; obstacles to access to justice for vulnerable groups and the provision of effective remedies at national level. CLM highlights the need for such a project through examples of possible law reform in employment and equality, housing and finally social welfare law. These suggestions for reform are all ultimately linked to the wider issue of access to justice and represent substantive, magnified versions of the wider project as advocated by CLM.

1. Examination of whether the Civil Legal Aid Scheme complies with European Convention on Human Rights

What do you suggest as a suitable project for law reform?

CLM suggests that the Civil Legal Aid Scheme in Ireland should be analysed with a view to examining the extent to which it complies with Article 6 of the European Convention on Human Rights. This should include an analysis of the barriers to accessing justice for those living in disadvantage and whether the current Civil Legal Aid Scheme addresses those barriers.

The right of access to justice is accepted as a constitutional principle and a right under the European Convention of Human Rights. However, in practice significant difficulties remain for a large sector of the population in accessing the courts or legal services.

Susan Gogan's research in Ballymun in 2005 showed that 76% of those with legal problems had sought help but were unable to obtain it¹. Furthermore the community consultation process during the setting up of Community Law and Mediation Limerick in 2012 showed that community organisations rated the availability of legal services to their clients as *not good/bad* and they had very limited expertise in this area themselves².

What issues have arisen in relation to this area that have caused you concern?

The barriers to accessing legal aid and justice were identified by the Committee on Civil Legal Aid & Advice who published their report in December 1977, commonly known as the *Pringle Report*³. This report acknowledged that the greatest single

¹ Gogan, Susan, Law from a Community Perspective Unmet Legal Need in Ballymun BCLC 2005.

² Limerick Community Law & Mediation Centre, Community Consultation Report: Unmet Legal Need in Limerick, 2013, Accessed on 13.09.2017:

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

³ The Pringle Committee Report on Civil Legal Aid, 1977

obstacle facing those living in disadvantage in need of legal services was not lack of finance but the following:

- For a variety of social and psychological reasons, poor people were hesitant about approaching lawyers and were intimidated by the legal world.
- Solicitor's offices were often geographically inaccessible and only open during normal office hours, rather than in evenings or at the weekend.
- Most people are unaware of their rights and lawyers in turn are ignorant of 'poor law'
- Many of the problems of the poor could only be solved through effective community organisation and development rather than on an individual case by case basis.

These conclusions were echoed in the conclusions of a report compiled by Community Law & Mediation (CLM) when setting up a second Community Law Centre in Limerick in 2012⁴. This report followed an extensive community consultation process to establish the legal needs of the Limerick area. The findings established that a very significant need existed for an accessible legal service, addressing issues such as housing, family/child related matters and social welfare entitlements, a fact which has been borne out by the legal queries received.

The findings of the report contained at section 5.2 are reflective of the issues highlighted in the aforementioned Pringle Report, i.e. that access to justice is far more than a cost issue. Outside of cost, the Report identifies the following barriers:

- lack of knowledge, information and understanding about the legal process, lack of understanding that an issue is in fact a legal issue,
- fear – of not being taken seriously, of retaliation if legal action is taken, and
- time, to include the waiting time for legal aid and the time involved in pursuing legal action.

CLM's practical experience is that these factors are very real deterrents to accessing legal services, and that the most effective way of breaking down these barriers is

⁴ Ibid

through meaningful community engagement along a mixed services model which incorporates community education and law reform in addition to legal advice and representation.

The aforementioned Pringle Report recommended that a Civil Legal Aid Scheme, should, *inter alia*, set out to make the public aware of their rights and identify necessary law reforms.

In Ireland, the current civil legal aid scheme was set up in response to the judgment in *Airey v Ireland* in 1979⁵. In this case, the European Court of Human Rights held that although the European Convention on Human Rights contains no provision on legal aid for civil disputes, Article 6 (1) may compel states to provide free legal assistance when such assistance proves indispensable for effective access to the courts, either because legal representation is mandatory under domestic law or because of the complexity of procedure or the case.

The Civil Legal Aid Scheme is based on a Service Model of Law Centre and is far removed from the recommendations in the Pringle Report as it only provides for one aspect of securing access to justice, the expense involved. It. There is no focus on community education, outreach or law reform. This model tends to be more reactive, responding to individual needs of the clients who approach the service with a readily categorized legal problem but may not necessarily be of strategic value to the wider community.

It is worth noting Zeman's observations on service models:

"...Inevitably over-loaded, service models can expend little time or energy in educating the community or on outreach programmes. Since service models accept the norms of the legal system and provide a service for poor people which, in the opinion of the administrators (inevitably lawyers), is the same for the poor as for the rich, poor people using service schemes face many of the same obstacles that they would encounter within the traditional setting. Such

⁵ *Airey v Ireland* [1979] 2 E.H.R.R. 305

service models offer little recognition of the uniqueness of the poor person's lifestyle. They neither make the service psychologically more accessible, nor do they attempt to handle problems which have not been on the traditional agenda of legal services (e.g. eviction). The service model reinforces the distance between the "recipient" and the "deliverer" of the service by encouraging clients to assume passive and dependent roles in their relations with the legal-aid scheme. Lawyers write briefs; interview witnesses; negotiate settlements and go to court. The client's perspective is generally of an over-worked, under-paid lawyer who is dealing with the immediate problem and ignoring the fundamental cancer of poverty and poverty-related problems that continue to affect the client⁶."

Apart from the model of legal aid, the Civil legal Aid scheme is limited in a number of other respects. The Civil Legal Aid Act 1995 designates certain areas outside the scope of the scheme including in relation to housing rights and representation before tribunals including the Social Welfare Appeals Office, the Equality Tribunal and the Employment Appeals Tribunal. These areas of law disproportionately affect disadvantaged communities and such exclusions may deny people on lower incomes access to the legal system. In both Susan Gogan's research in Ballymun in 2005 and CLM's community consultation report in 2012, housing emerged as the area of greatest need.

While the scheme is subsidised— there is a strict means test and if you qualify, a sliding scale of fees are charged depending on your income, with a minimum floor. The minimum fee for Legal Aid increased in the last number of years from €50 to €130. In terms of waiting lists, in June 2017, the maximum waiting times for first consultation in Law Centres ranged from 2 weeks in one Law Centre to 34 weeks in another with an average waiting time of approximately 14 weeks.

What problems does this give rise to in practice?

⁶ Zemans, Frederick, Perspectives on Legal Aid: An International Survey, London: Fr Pinter Ltd (1985)

It is certainly arguable that this Scheme doesn't comply with the *Airey* case i.e. at least some indigent litigants involved in complex litigation will be unable to obtain legal aid from the State because of the restrictive nature of the statutory scheme and that consequently Ireland may still be in dereliction of its international obligations. The exclusions within the scheme disproportionality affect those living in disadvantage and mean that there is no State funded legal aid in areas of need such as housing, social welfare, employment and equality. Furthermore, the lack of resources within the scheme mean that there are significant waiting lists for those trying to access the service. It is also arguable that that the model of legal aid adopted fails to address the barriers to accessing legal services identified in both the Pringle and CLM reports.

What would be the potential benefits of reform of this area?

If both the model of civil legal aid was revised and the exclusions reviewed, it would ensure that those who are most in need could access legal services.

1.1 Enforcement of awards in employment and equality cases

What do you suggest as a suitable project for law reform?

CLM suggests that the LRC analyse the enforcement of awards in employment and equality cases.

What issues have arisen in relation to this area that have caused you concern?

- Lack of legal aid
- Imbalance of resources
- Employees judged to have been unfairly dismissed and complainants judged to have been discriminated against unable to access awards that have been made, often after a protracted process culminating in a favourable adjudication.

What problems does this give rise to in practice?

- Undermining of the idea of access to justice/no effective redress
- Lack of effective remedy thereby undermining the idea of justice
- Barrier to access to justice

What would be the potential benefits of reform of this area?

- Deterrence
- Justice
- Increased access to justice

Any other general comments?

This area is one in which there is a real community need, in that it precludes individuals, particularly those without means, from enforcing awards made to them in employment and equality cases. While the process itself has been simplified to some extent by the Workplace Relations Act 2015, the reality is that many individuals never see the awards that are due to them from their employers/former employers because of the protracted nature of the debt enforcement machinery. This is particularly so for individuals who are forced to represent themselves before the Workplace Relations Commission, to which the remit of the civil legal aid scheme does not extend. The work of the Law Reform Commission on this issue would complement the changes introduced in the Workplace Relations Act 2015 and would ensure that the protections provided by the legislation translate into tangible awards for individuals, many of whom have been unfairly dismissed from employment.

The enforcement of employment and equality awards requires modernisation. It is not fit for purpose, particularly in view of the imbalance of resources that more often than not exists between employees and their employers. There is a clear public benefit to reforming this area and in making it more fit for purpose.

The Law Reform Commission's expertise is ideally suited to reforming this area. The investigations and recommendations it makes are transferable to other areas, for example the enforcement of maintenance in family law disputes and compensation in tenancy disputes. One suggestion is a system of converting unpaid awards into fines that can be imposed on employers who can pay the awards but are refusing or delaying payment. Anecdotally and in our direct experience of representing clients in employment and equality cases, there have been instances where employers have closed down companies and reopened them under the guise of a new legal company in order to avoid payment of awards for their unfair and sometimes discriminatory dismissal of their employees.

A client of CLM was awarded a substantial sum for unfair dismissal by the then Employment Appeals Tribunal. Her former employer did not attend any of the hearings and refused to pay the award, dissolving the company that employed her. It emerged that she had been given incorrect information that she instructed had been falsified. Her employer continued to operate from a number of different premises and is now before the courts for prosecution under the Companies Acts. While this protracted procedure is ongoing, the client remains unable to access her award, several years down the line, leading to considerable hardship.

CLM therefore advocates for a comparative study to be carried out in relation to enforcement mechanisms adopted in other jurisdictions and an analysis of the efficacy of same.

1.2 Examination of legislation relating to homelessness

What do you suggest as a suitable project for law reform?

CLM suggest that Sections 2 and 10 of the Housing Act 1988, as amended, in relation to the definition of homelessness and the provision of emergency accommodation, respectively, be assessed with a view to establishing whether there

is a need to expand upon the provisions in light of varying interpretations by local authorities.

What issues have arisen in relation to this area that have caused you concern?

One issue that has arisen both in CLM's work and the work of other independent law centres is the issue of the assessment process regarding homelessness and the non-legislative distinction between homelessness and *rooflessness*. CLM has dealt with cases whereby the local authority has made a distinction between being homeless and roofless. There appears to be uncertainty and variance between local authorities on the assessment process, for example, as to whether someone who is sleeping on a couch of a family member qualifies as homeless. There are no statutory instruments or guidelines which elaborate on the interpretation of homelessness under section 2 of the Housing Act, and the process by which an assessment of homelessness is made therefore appears to afford a certain degree of discretion to the local authority.

A further issue is when someone turns down emergency accommodation as they believe it is not suitable or safe and are then deemed to not be in need as a result of their refusal.

This is a major cause of concern in light of the current homeless crisis nationally and CLM would suggest that an extensive overhaul of housing law be undertaken with a view to providing both detail and clarity as to the concept of homelessness and the rights of individuals who find themselves having to access emergency accommodation.

What problems does this give rise to in practice?

- Uncertainty for people applying for emergency accommodation as to their rights
- Variance between the interpretations of the legislation gives rise to discrepancies in treatment thus undermining the fairness of the legislation

- Lack of access of justice due to lack of clear legislation

What would be the potential benefits of reform of this area?

- Greater clarity and certainty for homeless people in terms of their status under section 2 and consequential entitlement to emergency accommodation under section 10 (certainty being one of the facets of justice)
- Equality in that such persons receive equal treatment irrespective of the particular local authority dealing with the case

1.3 Examination of legislation relating to State Contributory Pension

What do you suggest as a suitable project for law reform?

Finally, CLM suggests that the LRC examine whether the provisions of the Homemakers Scheme set out in Sections 108 and 109 of the Social Welfare (Consolidated) Act 2005 (as amended) are compatible with the equality guarantee of the Constitution and with Articles 6, 14 and Article 1 of Protocol 1 of the European Convention on Human Rights. CLM submits that this incompatibility arises on the ground that the cut off year (1994), as set out in the Homemakers Scheme, arbitrarily discriminates on the basis of gender and age.

The Homemakers Scheme entitles persons wishing to claim a state contributory pension, who provide full time care for a child under the age of 12 or an ill or disabled person aged 12 or over, to disregard those years in assessing the yearly average contributions for the purposes of calculating the rate of pension to which a person may be entitled.

The scheme was introduced in 1996 and the commencement date for the purposes of the scheme is April 1994. Cases referred to the Law Centre have shown that the

impact of the selection of the commencement date of 1994 has the effect of both directly and indirectly discriminating against older women who took time out of the workforce (or could have been forced to leave due to the marriage bar) to care for children or a person with a disability because they are only entitled to disregard from 1994 onwards.

What issues have arisen in relation to this area that have caused you concern?

CLM is currently representing a client who wishes to challenge the provisions of the Homemakers Scheme on the basis that she left the workforce in the early 1970's to care for her family and re-joined the workforce some years later. However due to the commencement year of 1994, she can only disregard less than five years pursuant to the terms of the scheme and will receive a reduced rate of pension contribution as a result of the yearly average rule. CLM believes that this issue affects a wider group of people; namely older women who took time out of the workforce to care for their children who are now of pension age and are only entitled to a reduced rate of pension.

What problems does this give rise to in practice?

The effects of the Scheme results in lower rates of contributory pension for women in comparison to men of a similar age. Various NGOs such as Age Action have compiled studies in relation to the disparity in pension rates of women in comparison to men.

What would be the potential benefits of reform of this area?

If the Scheme was reviewed and the commencement date was changed to include an earlier date, the disparity in pension rates between men and women would be reduced.