

**30<sup>th</sup> Anniversary Conference  
15<sup>th</sup> September 2010**

**Achievements and challenges**

**Frank Brady, Director of Legal Aid**

**Introduction**

I am pleased to be here today and to have the opportunity to speak at this conference. It is hard to compare the current service with the civil legal aid service that was launched in 1980. Looking back it is very encouraging to realise the progress that has been made. Getting the service off the ground was a major challenge and because of the nature of the service there was very little precedent on which to rely. A management structure had to be devised; an action plan drawn up for getting the service up and running; solicitors and other staff recruited and premises acquired, as well as all of the administrative arrangements that had to be developed. I first joined the Board in March 1980 and was directly involved in the initial set up of the Board.

It was a great experience and the fact that the service was set up and running in a relatively short time period was due in large measure to the enthusiasm and creativity of a small cadre of administrative staff under the leadership of the late Ms Mella Carroll, Chairperson and Chief Executive Pearse Rayel. Once solicitors were recruited, a great spirit of adventure and collegiality developed that was of tremendous assistance in the early years of the service.

I would like to extend a particularly warm welcome to the six of the first fifteen solicitors who commenced work in the Board in August/September 1980 and who are still working with the Board. They are Hugh Cunniam, Mary Griffin, Tom Nally, Josephine Fair, Fiona McGuire and Ray Finucane.

While the paper for this conference covers achievements and challenges, any review of the past thirty years of the Board must of its nature be selective. I would hope to provide an overview of the principal developments and create a better understanding of the organisation and an appreciation of the progress made in providing a service to the public, often against a background of difficult financial constraints. I propose then to outline what I see as some of the challenges facing the Board.

**Background**

Before going into the substantive area of achievements, it is useful to outline briefly the background to the establishment of the Board.

***Free Legal Advice Centres***

In the 1970's, civil legal aid was provided to persons of modest means mainly through the efforts of voluntary groups, in particular, the Free Legal Advice Centres (FLAC). In 1969, a group of post-graduate law students established FLAC, which continues to this day to provide an invaluable service to many persons who otherwise would go

without legal advice. A full time centre - Coolock Community Law Centre - was established by FLAC in 1975.

### ***Pringle Committee***

On the 10<sup>th</sup> June 1974 the Minister for Justice appointed the Hon. Mr Justice Denis Pringle to chair a committee to advise on the introduction at an early date of a comprehensive scheme of legal aid and advice in civil matters. In December 1977, the Committee produced a report which recommended the introduction of a comprehensive scheme of civil legal aid and advice to be provided both by lawyers in private practice and by lawyers at community law centres and legal advice centres.

### ***Airey Case***

Mrs Airey applied to the European Court of Human Rights for a declaration that Ireland was in breach of the European Convention because she did not have effective access to the High Court in order to petition for a legal separation, in circumstances where she could not afford private representation. The Court held (September 1979) that there had been a breach of Article 6.1 of the Convention stating:

*Having regard to all the circumstances of the case, the Court finds that Mrs Airey did not enjoy an effective right of access to the High Court for the purpose of petitioning for a decree of judicial separation.*

At hearings before the European Court (February 1979), Counsel for the Government informed the Court that the Government had decided in principle to introduce legal aid in family law matters.

The decision of the European Court of Human Rights in the Airey case was of critical importance to the setting up of a civil legal aid service in Ireland. A number of points need to be made in relation to the judgement of the European Court:

- Article 6.1 of the European Convention on Human Rights secures for everyone the right to have any claim relating to civil rights and obligations brought before a court or tribunal;
- the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective;
- it is necessary to ascertain whether an appearance before the court without the assistance of a lawyer would be effective, in the sense of whether a person could present their case properly and satisfactorily;
- in certain eventualities, the possibility of appearing before a court in person, even without legal assistance, will meet the requirements of Article 6.1. There may be occasions where such a possibility secures adequate access even to the High Court;
- Article 6.1 leaves to the State a free choice of the means to be used towards this end;
- the institution of a legal aid scheme constitutes one of those means but there are others such as, for example, a simplification of procedures; and
- the judgements of the European Court on the Convention do not imply that the State must provide legal aid for every dispute relating to a civil right.

It should be noted that the institution of a civil legal aid scheme is but one of the methods by which a person can have effective access to the courts. I will return to this when addressing the challenges facing the Board.

## Achievements

### Significant developments

Under this heading, I will outline the development of the legal aid service from 1980 to 2010 with a particular focus on the growth and expansion of the service.

#### *The early years*

The Scheme of Civil Legal Aid and Advice was laid by the Minister for Justice before each House of the Oireachtas in December 1979. It provided for the establishment of the Legal Aid Board and covered issues such as the provision of legal aid and advice, legal aid certificates, financial eligibility, the establishment of law centres, legal practitioners etc.

The Minister for Justice appointed the first Legal Aid Board on the 21<sup>st</sup> December 1979 with the late Mella Carroll S.C. as the first Chairperson. The Minister stressed the importance of the Scheme as an instrument by which the concept of equality before the law could be brought substantially nearer to realisation in practice.

Pearse Rayel the Board's first Chief Executive and the other Head Office administrative staff were appointed in February/March. At its meeting in March 1980, the Board approved targets for the opening of law centres; the recruitment of staff; the development of a system for dealing with legal aid applications; a system of finance and accounts, arrangements for the acquisition of premises etc.

The Board's first two law centres - 45 Gardiner Street, and Aston Quay, in Dublin - were opened on 15<sup>th</sup> August 1980. At the official opening of Gardiner Street Law Centre, the Minister for Justice said he was confident that in time the scheme would make necessary legal services available to every deserving person anywhere in the country. Other law centres opened in 1980 were Galway, Limerick, Sligo in August; Cork (now Pope's Quay) in September, and Waterford in December, while Ormond Quay Law Centre was opened in 1982.

With the appointment of Ms Carroll as a Judge of the High Court, the late Mr Vincent Landy, S.C. was appointed Chairperson in 1980. In the foreword to the first Annual Report, he pointed out that the growth of legal aid throughout the world during the 20th century reflected acceptance of the fact that access to justice was a basic human right and acceptance also of the fact that State intervention was necessary to secure that right. He concluded that the introduction of the Scheme at the end of 1979 was a significant step towards the aim of securing justice for all in Irish society.

While still a relatively new organisation, the dedication and enthusiasm of the staff was clear, especially to other practitioners and to the judiciary. Praise for the staff came not only from the Board but also from outside. The then President of the High Court, Mr Justice Finlay, said:-

*"I have personally been immensely impressed by the standard of compassion, moderation and wisdom which has been displayed by solicitors acting in law centres throughout the country. Their dedication to their task and the overall sense of responsibility and prudence which they bring to it frequently displayed in*

*quite young practitioners has been something which I have consistently noticed and it seems only proper that I should take this opportunity of making public recognition of that work and those standards”.*

I would concur with that comment.

The difficult economic climate that continued through the mid-1980's created challenges for the Board and meant that it was unable to develop the service as it had planned and meet the demand for services. The Government agreed, however, in 1985 to give the Board authority to expand the services available with a new law centre opening in Cork during that year followed by centres in Athlone and Tralee 1986 and Tallaght in 1987.

In 1990, the then Chairperson, Niall Fennelly, S.C. resigned from the Board along with some other Board members in protest at a lack of adequate funding. When Mr Vincent Landy S.C. was again appointed Chairperson he received a commitment from the then Minister for Justice that the administrative Scheme of Civil Legal Aid and Advice would be put on a statutory footing.

In November 1991, the Incorporated Law Society of Ireland produced a Report by their Committee on Civil Legal Aid under the Chairmanship of Moya Quinlan, solicitor, and a former member of the Board. Amongst other things, the Committee sought an improved network of law centres and also believed that the improvement of the service necessitated the involvement of private practitioners.

Towards the end of 1991 law centres were opened in Letterkenny, Castlebar and Dundalk, while the Aston House Law Centre was replaced by Clondalkin Law Centre.

#### ***Development Plan 1993/1995***

In 1993, responsibility for civil legal aid was transferred from the Minister for Justice to the Minister for Equality and Law Reform. The Board set about preparing a plan for the development of the service with a view to achieving its objective of a nationwide service.

The Board's Development Plan provided for the opening of fifteen new law centres; the recruitment of over fifty solicitors, and for the use of private practitioners in the delivery of civil legal aid services. With approval of the Minister for Equality and Law Reform and the necessary funding in place, the Board set about a major expansion of the service and opened new law centres in Nenagh, Longford, Kilkenny, Portlaoise, Wicklow and Monaghan in 1994; Blanchardstown and Mount Street, (Dublin), Ennis and Wexford in 1995, Navan and Cavan 1996; Newbridge and Tullamore in 1997.

Another major aspect of the Development Plan was a proposal to engage solicitors in private practice to provide civil legal aid services. In September 1993, the Scheme was amended and the Board's proposals for a pilot project involving the use of private practitioners in domestic violence, maintenance and custody cases in the District Court were approved by the Minister and came into operation in October 1993. The introduction of this service has been a major factor in providing flexibility in the

provision of legal aid services and enabling the Board meet the increasing demand for civil legal aid in the District Court.

### ***Civil Legal Aid Act 1995***

The Civil Legal Aid Bill was published in February 1995 by the Minister for Equality and Law Reform, who also appointed a new Legal Aid Board under the Chairmanship of Claire Connellan in April 1995.

The Civil Legal Aid Act was passed by the Oireachtas, was signed by the President on the 16<sup>th</sup> December 1995 and came into force by regulation in October 1996. The establishment of the Board on a statutory basis was a significant and historical development in the provision of civil legal aid services. While the Act incorporated many of the provisions of the original Scheme, it clarified various legal uncertainties and provided for the first time a statutory entitlement to civil legal aid, subject to the provisions of the Act and Regulations. One of the features of the Act was the provision in section 5 which requires that services be provided within the resources available to the Board. This became a central aspect of legal actions in the Kavanagh and O'Donoghue cases referred to later in this paper.

### ***Refugee Legal Service (RLS) 1998/99***

In a major development of the civil legal aid service, the Board and the Minister for Justice, Equality and Law Reform reached agreement in November 1998 for the establishment of the Refugee Legal Service as a separate office to provide professional independent legal services to asylum applicants at all stages of the asylum process. The RLS commenced providing a service to asylum seekers in February 1999. Ministerial Orders formally extending the Board's jurisdiction to provide legal aid for representation before Refugee Appeal Tribunals were made in April and August 1999.

The RLS developed rapidly to an approved staffing complement of 140 posts and an annual budget of £8 million. It has provided legal services to some 40,000 asylum seekers.

### ***The past ten years 2000 to 2010***

By 2000, the Board was providing legal services on a nationwide basis, with a staff of some 400, including over 110 solicitors. The service had reached maturity and the focus switched from expansion to internal improvements, supports, more effective management and development of mechanisms to ensure consistency across a widely dispersed service. In the later years, the Board undertook formal and structured reviews of the arrangements for service delivery in the RLS (2007) law centres (2008) and Head Office (2009). In implementing the various recommendations contained in the reports resulting from the review process, the Board continually seeks to adapt the service to meet changing conditions and demands. During this period, the late Mr Eamon Leahy acted as Chairperson and was replaced after his untimely death by the current Chairperson Ms Anne Colley.

The significant developments in terms of service delivery over the past decade included:

- the establishment of the Refugee Documentation Centre in 2000 to provide a specialised research and query service on Country of Origin information for all agencies involved in the asylum determination process;
- the setting up of a specialist Medical Negligence Unit in 2006, to deal with applications from persons seeking legal aid in respect of cases in which the applicant is seeking redress for possible medical negligence (previously such cases were dealt with in the law centre to which the person applied);
- an increasing focus on alternative methods of resolving conflicts and disputes, including a considerable investment by the Board in training solicitors in the collaborative law process;
- in an effort to provide a more timely service, the Board introduced an “advice only” service to provide legal advice to applicants on their problem, even though many might need to wait a further period before the Board was in a position to provide a legal aid service;
- George’s Lane Law Centre was opened in 2009 with a differing staff structure to enable the Board pilot and evaluate the scope for making more effective and cost efficient use of solicitor and paralegal staff in the delivery of front line legal services;
- the provision of legal advice in relation to human trafficking in 2009;
- the ongoing development of the Board’s website, and
- a reduction in staff numbers while demand has increased substantially over the last three years arising from the impact of the current economic and financial circumstances in the country.

Despite the very significant developments that have taken place in the legal aid service, one of the challenges for the future is to ensure the ongoing responsiveness of the Board to a changing economic and social environment.

Any review of developments in the Board requires mention of the Government decision of July 1999 that set the organisation in a new direction - Cahirciveen. While the decision took the Board by surprise, the Board approached the implementation of the decision in a very professional manner; carried out an assessment of the potential impact of the decision and found that many of the Head Office activities could be carried out from Cahirciveen. Following discussions with the then Minister, the Board set about transferring to Cahirciveen, while maintaining a number of positions in an office in Dublin. It is a move that has worked well for all involved.

### **Service delivery**

The legal aid service is, and always has been, very much a service model, as opposed to a strategic model, of legal aid with public education and research not formally included within the remit of the Board.

### ***Arrangements for delivery of legal services***

Legal services are provided through law centres established by the Board, together with a complementary service provided by private solicitors in certain family law matters.

The Board provides a priority service to persons seeking legal services for domestic violence, child care, child abduction and for certain other matters where there are statutory time limits. This priority service seeks to ensure that persons seeking legal remedies in respect of such matters receive a timely service from the Board. In other cases, the demand for legal services has generally exceeded the capacity of the Board to provide such services. This has resulted in waiting lists being maintained in law centres and these waiting lists have highlighted the lack of capacity of the Board to provide a timely service to all applicants from time to time over the years.

The Board also engages the services of solicitors in private practice to handle certain family law cases in the District Court. This service has greatly assisted the Board in providing a timely service to many applicants for District Court remedies.

The Board also introduced a scheme for the use of private practitioners in divorce and judicial separation cases in the Circuit Court in 2005, having originally piloted a scheme in 2001. It contributed initially to the progress made in securing a major reduction in waiting times for legal aid. At present, limited use is made of this Scheme, having regard to the current financial constraints facing the Board.

The number of persons applying for legal services remained reasonably consistent for 10 years after reaching a peak in 1997, coinciding with the introduction of divorce in February of that year. There has been a very notable increase in demand for services since 2007 and this increase is having a significant impact on the capacity of the Board to provide a timely service. There has been also an increase in the numbers waiting for services in law centres as well as in the overall waiting times.

The numbers seeking legal services in the law centres from 1997 was as follows:

<b>Year</b>	<b>New Applications</b>
1997	13,400
1998	11,400
1999	9,600
2000	8,900
2001	8,500
2002	9,000
2003	10,500
2004	9,600
2005	9,200
2006	9,700
2007	10,100
2008	11,900
2009	14,100
2010	15,500 (estimated)

The figures in the Refugee Legal Service also reflect certain peaks in the early years when there was a considerable influx of asylum seekers. The figures have been tapering off in recent years as a consequence of a number of Government and EU initiatives and of certain developments such as enlargement of membership of the EU.

<b>Year</b>	<b>New Asylum Applications</b>	<b>Refugee Legal Service New Clients</b>
1999	7,800	1,600
2000	11,000	3,400
2001	10,300	4,500
2002	11,600	5,700
2003	7,900	5,600
2004	4,800	3,500
2005	4,300	3,330
2006	4,300	3,000
2007	4,000	2,700
2008	3,900	3,200
2009	2,700	2,300
2010	2,100 (estimated)	1,700 (estimated)

In addition to legal aid services provided through law centres, including the RLS, there has been a substantial increase in the number of cases referred to private practitioners, particularly in relation to District Court services. The following table sets out the growth in the use of private practitioners in recent years, together with a breakdown as between the District and Circuit Courts:

<b>Year</b>	<b>District Court</b>	<b>Circuit Court</b>
2003	900	N/A
2004	650	N/A
2005	1,600	330
2006	1,600	160
2007	2,000	330
2008	2,800	170
2009	3,900	100
2010	4,800 (estimated)	70 (estimated)

### ***Scope of the service***

The long title to the Civil Legal Aid Act 1995 (the Act) reads: “*An Act to make provision for the grant by the State of legal aid and advice to persons of insufficient means in civil cases*”.

The scope of the Act is very broad, particularly in relation to legal advice. The common public perception that the law centres are a “family law service” is not a correct understanding of the position. Legal advice is available for a range of matters, such as, social welfare, debt and consumer law matters as well as legal advice for persons who are appearing before tribunals.



Demand for the Board's services arises largely in the family law area. Law centres do undertake, however, other civil law work, including medical and professional negligence cases, as well as contract and debt matters.

Persons having an interest in the availability of civil legal aid should endeavour to accurately portray the true scope of the service, rather than constantly referring to it as a family law service. Such an approach would result in a greater awareness by the public as to the extent of the service provided leading to the provision by the Board of a broader range of services through its law centres to persons who would qualify for legal services.

While certain matters/areas are excluded from the scope of legal aid, I would recommend that any person with a civil law problem and who is likely to meet the means test criteria should apply to a law centre and find out if the law centre can assist them with their problem.

### ***Means Test***

The means test for determining financial eligibility for legal services has been revised from time to time over the years. At the 2002 revision, the Board took the opportunity to seek to simplify the income assessment for the benefit of persons applying for legal services. This involved reducing the number of allowances and increasing substantially the income limit to €13,000, to take account of the elimination of a series of what were very low allowances. The last revision of income limits took place in 2006, when the limit was increased to €18,000. At present, we are working on ways to streamline the means testing procedures to make it easier for applicants and less time consuming for the staff involved in means testing. This is in line with Government policy on streamlining and simplifying means tests assessments.

### ***Merits test***

Sections 24, 26 and 28 of the Act contain the merits criteria that applicants must meet before legal advice and legal aid will be granted. Section 28(2) of the Act sets out the five conditions that must be complied with before legal aid may be granted: the applicant must comply with the means test prescribed in Section 29; the applicant must have, as a matter of law, reasonable grounds for instituting, defending or being a party to proceedings; the applicant must be reasonably likely to be successful; the proposed proceedings must be the most satisfactory means to achieve the result sought; and the Board must be satisfied that, having regard to all the circumstances of the case, it is reasonable to grant legal aid.

The criteria set out in the Act are objective and require that the decision maker form an opinion in relation to each of those matters before making a decision to grant or refuse legal aid. The criteria are similar to the provisions of the original Scheme, but their application has been informed by decisions of the High Court in cases referred to below.

### ***“Free” Legal Aid***

One thing that has not changed over the years is the tendency of persons to refer to the scheme of civil legal aid as “free legal aid”. It is not free. The service has to be paid for and the burden of paying for it falls on the taxpayer. In addition, clients have to pay a contribution - in the vast majority of cases this amounts to a maximum of €50 for representation in court. The continual reference to “free” legal aid causes confusion for applicants who are surprised that it is not free and for the staff who have to deal with such situations.

The Act provides for the recovery by the Board of the cost of providing legal services. A legally aided person is provided with legal representation at State expense as a means of securing access to the courts. Accordingly, if the legally aided person is successful and monies or property are recovered, then the person is liable to make a payment to the Board in respect of the costs incurred by the Board in providing services. The Act provides also for certain exemptions from the liability for costs, for example, for the family home. This approach is consistent with international experience and, indeed, other jurisdictions have a more comprehensive approach to the recovery of costs through a statutory charge.

### **Flexibility and Change**

Since the beginnings of the Board in 1980, there has been an ongoing willingness to embrace fresh thinking and to adapt to changes in legislation and demands for legal services.

### ***Changing nature of cases for which legal aid is granted***

A review of the statistics contained in annual reports over the years clearly demonstrates the changing nature of the services provided by the Board. It must be recalled that when the legal aid service commenced in 1980 there were very few family law remedies available to the public. Reliefs comprised mainly of remedies in the District Court, divorce a mensa et thoro in the Circuit Court and nullity in the High Court.

The bulk of the work of law centres in the early years was in the District Court, but the nature of their work changed dramatically, primarily due to the wide range of new legislation enacted in the family law area, in particular the Judicial Separation and Family Law Reform Act 1989 and the Divorce Act 1996.

The changing nature of the workload of law centres has significant resource and cost implications. Cases in the Circuit Court are more time consuming and this limits the capacity of law centres to take on new cases. In addition, most Circuit Court cases involve the use of counsel with consequent cost implications.

Apart from the changes necessary following the enactment of new legislation, many other changes have led the Board to adopt a pragmatic approach to resolving difficulties and responding to client and staff demands and needs.

### ***Use of private practitioners***

One of the biggest changes in service delivery arrangements was the decision to engage solicitors in private practice to provide a legal aid service in certain District Court cases. The original Scheme was based in part on recommendations of the Pringle Committee. Their Report recommended that legal services be provided by a combination of salaried solicitors and solicitors in private practice.

In 1993, the Board formed the opinion that there was scope for the use of private solicitors to provide a cost effective means of delivering legal aid services. A pilot scheme was introduced and evaluated and concluded that there was scope for the use of private practitioners to complement the salaried service in District Court cases. The Board then established the private practitioner service on a permanent basis.

The Board proceeded to extend the scope of the private practitioner service to provide services in divorce and judicial separation cases in the Circuit Court. A pilot project was set up in 2001/2002 and its effectiveness evaluated. Following this evaluation, the Circuit Court scheme was introduced on a permanent basis in 2005.

The introduction of private practitioners to provide services was a major change in the arrangements, but has proven invaluable in assisting the Board provide a timely service to applicants.

### ***Changes in society***

The majority of the Board's advice and aid services relate to family law and this work is carried out in a rapidly changing environment. In 1980, when the Board commenced operations, family law legislation, although limited, was very straightforward. Increasingly, however, the legislature and the judiciary have had to face up to the changing nature and patterns of family law and changing social and family arrangements. The pressures of the modern world have produced huge changes in Ireland over the past thirty years. An increasingly mobile population means that it is not uncommon for a family to have substantial connections with more than one country, introducing an international dimension to family law.

In the context of the international dimension to the work of the Board, it is interesting to note that the Board will be involved later this month in a case which the Supreme Court has referred to the European Court of Justice for a preliminary ruling pursuant to Article 267 of Treaty on the Functioning of the European Union (J.McB. –v- L.E. unreported Supreme Court 30<sup>th</sup> July 2010). The Refugee Legal Service also has a case which is being referred to the European Court for a similar ruling. This case relates to the application of the Dublin ii Regulation and the return of asylum seekers to Greece. This is a major change from the work undertaken when the Board was established.

As more reliefs and remedies have become available, more people have resorted to law to resolve their problems. These changes and the consequent increase in demand for services have impacted, and will continue to impact on the work of law centres.

In order to enable the Board deal with the increased demand for services and the needs of applicants for an effective remedy, the Board has committed itself to

developing alternatives to the courts as a means of resolving problems. Recourse to the courts is a slow and expensive method of dealing with family law problems. Members of the public are slowly becoming aware that the outcome of court proceedings, or of settlement negotiations conducted on the day of a court case, frequently produce results which satisfy neither party. There is a need for the Board to provide a greater range of options, whether that is collaborative law, mediation, or some other form of structured negotiation, perhaps as developed by Kevin Liston, *Family Law Negotiations: An alternative Approach* (Thompson Round Hall, 2005)

### ***Service delivery change***

There has been a close working relationship with professional bodies and other stakeholders, particularly staff, to continue to strive for best practice in the delivery of legal services. The past decade has seen the Board placing a major focus on bringing the best of public service standards of accountability and transparency into a legal setting. This has led to the introduction of best practice guidelines, file reviews, risk management and reporting protocols.

Information technology can lead to an improvement in the delivery of services as, for example, in the Revenue Commissioners, where there has been a significant increase in customer satisfaction figures. The Board has decided to invest in an automated legal case management system and arrangements are ongoing for the procurement of an appropriate system. The planned legal case management system will seek to integrate the best of our existing processes into a user-friendly format for the front line staff. It will form part of a major change management process in the Board that will streamline current operations; lead to a significant reduction in routine typing, clerical and administrative work; improve record keeping and management information; and enable the Board more effectively manage the risk that is inherent in legal service delivery.

The Board is an Equal Opportunities Employer. The legal profession has a decided gender balance in favour of women and the Board had adopted best practice in terms of family friendly policies, which ensured that extremely low staff turnover even during the so called Celtic Tiger years. With the new case management system, the benefits of better work/life balance may be harnessed further with possible scope for greater remote working practices.

The setting up of the RLS is a good example of an organisation adapting to changing requirements. When considering the arrangements that would be put in place to provide a service to asylum seekers, the Board had regard to the then existing structural arrangements for providing legal advice and legal aid. However, following careful consideration of the nature and extent of the service that would be required by asylum seekers and having regard to the legislation in force, a new model of service delivery was developed. The RLS model of paralegal involvement has been embedded into a service which allows us to adapt to changing client requirements/ demands.

### **Case Law on the availability of civil legal aid in Ireland**

There have been a number of cases in which the courts have considered the availability of legal aid and which impact on the future direction of the Board. These are considered in chronological sequence.

#### ***M.C. v. The Legal Aid Board & Ors. [1991] 2 I.R. 43***

In this case, Gannon J. held that an individual citizen did not have a constitutional right to require that the State provide financial support for civil litigation with another citizen. He said:-

*“By adopting the scheme for funding legal aid and advice to impecunious litigants the State provides resources to enable such persons to obtain the services of skills adequate to that of an adversary in civil litigation. In my opinion, the adoption of that scheme does not impose any duty on the State or on the Legal Aid Board to any litigant involved in civil litigation other than to ensure that the scheme is implemented fairly to all persons and in a manner which fulfils its declared purpose. I am not convinced that there is any provision in the Constitution which imposes a duty on the State to provide any form of support for civil litigation among citizens. In the absence of such duty I can find no express or implied right in any citizen to require the State to provide financial support for, or to afford free facilities for, civil litigation of a dispute with another citizen.”*

That decision was given in the context of the non-statutory scheme of civil legal aid and advice.

#### ***Stevenson v. Landy & Ors. (Unreported 10<sup>th</sup> February, 1993)***

In this case, the Legal Aid Board had refused to grant legal aid to the mother of a child involved in wardship proceedings taken by the Eastern Health Board. The High Court quashed the Board's decision and referred the matter back to the Board to apply the provisions of the Scheme in light of the conclusions of the Court on the interpretation of the Scheme. Lardner J. quoted from the judgement of O'Higgins C.J. in *The State (Healy) v. Donoghue* [1976] I.R. 325 where he had said at page 350:-

*“The requirements of fairness and 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 his livelihood, justice may require more than the application of normal and fair procedures in relation to his trial. Facing as he does, the power of the State which is his accuser, the person charged may be unable to defend himself adequately because of ignorance, lack of education, youth or other incapacity. In such circumstances his plight may require, if justice is to be done, that he should have legal assistance. In such circumstances, if he cannot provide such assistance by reason of lack of means, does justice under the Constitution also require that he be aided in his defence? In my view it does.”*

Having quoted that passage Lardner J. stated:-

*“That Statement was made in relation to a criminal prosecution. The present case is of a different nature. Having considered the circumstances of the Applicant and in which the application for legal aid to be represented in the*

*wardship proceedings is made, I have come to the conclusion that the dicta which I have quoted are applicable, mutatis mutandis, to the wardship proceedings.”*

***Kavanagh v The Legal Aid Board & Ors.*** (Unreported, High Court, Butler J., 24<sup>th</sup> October, 2001)

The applicant took judicial review proceedings claiming that the Board was failing in its duty because of a delay of some 20 months in the provision of legal aid. The High Court refused the application on the basis that the Board was operating in accordance with section 5 of the Act.

The High Court considered the approach to the interpretation of section 5 of the Civil Legal Aid Act. In the course of his ruling, Butler J. said that:

*“The grounds upon which relief is sought in these proceedings are entirely based upon an alleged breach of statutory duty. No question arises as to any rights to which the Applicant may be entitled by virtue of the Constitution or by any international convention. The claim is solely based upon rights and duties arising from the Legal Aid Act, 1995.”*

He then considered s. 5 of the Act and said

*“I am satisfied that the language of section 5 (1)... is plain and obvious and requires no special interpretation. The Board shall provide, within its resources and subject to other provisions of the Act legal aid to persons who satisfy the requirements of the Act. The words simply mean that legal aid shall be provided within the Board’s resources and I am fully satisfied on the basis of the Affidavits (and it seems to me that there is no controversy on this aspect of the matter) that this is precisely what the Board did in this case.”*

***Marie O’Donoghue v The Legal Aid Board, the Minister for Justice, Equality and Law Reform, and Others*** (Unreported, High Court, Kelly, J., 21 December 2004)

Ms O’Donoghue took these High Court proceedings after experiencing a delay of 24 months between contacting the Board seeking legal aid and obtaining legal services. The applicant claimed that the Board was guilty of a breach of statutory duty, negligence and had denied her certain rights due under the Constitution and the European Convention on Human Rights.

The Board defended the case on the basis that it had to operate within the resources available to it in accordance with the provisions of section 5 of the Act. The Court was satisfied that the cause of the delay was the absence of resources to meet the demand for legal services and that the delay resulted from the failure on the part of the State to fund the Board properly. The Court found that the statutory obligation imposed on the Board is not an absolute one; it requires the Board to carry out its functions within its resources.

During the course of the proceedings, the Board accepted that the plaintiff had a statutory right to apply for legal aid and a statutory right to receive it, provided that she met the qualifications. Nevertheless, the Board contended that there was no breach of statutory obligation because of the saver contained in section 5, which makes carrying out the principal function of the Board subject to the resources available to it.

Kelly, J. stated that

*“I am of the view that the Board is correct in this contention. The statutory obligation imposed upon it is not an absolute one. It requires it to carry out its functions within its resources. In the present case there is in my view no doubt but that the delay encountered by the plaintiff was caused exclusively because of the lack of resources made available to the Board. Those lack of resources were directly responsible for the 25 month delay between her first going to the law centre and the grant of the legal aid certificate to which she was undoubtedly entitled”.*

Kelly, J. considered the Kavanagh case and proceeded to *“absolve the Board from any liability for either breach of statutory duty or negligence in the way in which it dealt with the plaintiff’s claims”.*

Ms O’Donoghue also claimed that the State had an obligation to her under the Constitution and under the European Convention on Human Rights. The State contended that there is no statutory, constitutional or European Convention right to legal aid.

Kelly, J. then referred to the judgement (31 July 2003) of the Court of Human Rights in *Doran v Ireland*, regarding a delay in litigation proceedings. He referred to certain submissions of the Government in that case and noted that the submissions made to the High Court by the State in the O’Donoghue case were in many respects the polar opposite of what was being said by the State to the European Court of Human Rights in *Doran v. Ireland*.

In the case of Ms O’Donoghue, Kelly, J. stated

*“she had no realistic prospect of access to the courts without the assistance of a lawyer. I agree with her. She qualified for such assistance under the relevant statutory provisions and regulations but was denied the necessary help for a period of 25 months”.*

Having reviewed the Stevenson case, Kelly, J then stated:-

*“Applying the approach of Lardner J. it seems to me that the unfortunate circumstances of the plaintiff in the present case are such that access to the courts and fair procedures under the Constitution would require that she be provided with legal aid. That view is reinforced by the fact that she fell squarely within the entitlements to such under the Act and the regulations but was denied it for a period of 25 months because of the manifest failure of the State. The delay in granting the certificate for legal aid, in my view, amounted to a breach of the constitutional entitlements of the plaintiff.*

*It is not enough to set up a scheme for the provision of legal aid to necessitous persons and then to render it effectively meaningless for a long period of time. The State must per Gannon J. (in M.C. v. Legal Aid Board) ensure that the scheme “is implemented fairly to all persons and in a manner which fulfils its declared purpose”.*

*The purpose of the 1995 Act is that persons who meet the necessary criteria shall receive legal aid. That carries the implication that the entitlement to legal aid*

*will be effective and of meaning. How can it be if a delay of 25 months is encountered? Equally, how can the scheme be fair if a qualified person cannot get to see a solicitor for such a lengthy period?*

*The Act of 1995 gives substance, in many ways, to the constitutional entitlement to legal aid for appropriate persons. The legislature is entitled to define reasonable limits to that right. But the right cannot be effectively set at nought for years in the manner that it was here. I am of the opinion that the rights under the Constitution identified and described in the paragraphs quoted from the State's submission to the European Court of Human Rights in *Doran v. Ireland* are as applicable to this plaintiff as they were, on the State's own case, to the Dorans."*

***Martin & Doorley v Legal Aid Board & Others*** (Unreported High Court, Laffoy, J. 23<sup>rd</sup> February 2007)

In these proceedings the plaintiffs, who are solicitors employed by the Board, sought the following declaratory reliefs:

- *"a declaration that the decision of the Board to permit, by itself and/or by its authorised officers, an unfettered right of access to case files is void, ultra vires and in breach of the provisions of the Constitution and the European Convention on Human Rights; and*
- *if necessary, a declaration that s. 32(2) of the Civil Legal Aid Act, 1995 (the Act of 1995) is invalid and repugnant having regard to the provisions of the Constitution and, in particular, Articles 34, 38 and 40 thereof."*

The High Court dismissed the plaintiff's claims and the matter is under appeal to the Supreme Court.

In her judgement, Laffoy, J. stated:

*"Whether one adopts a literal or a purposive approach to the construction of sub-s. (2) without regard to the constitutional dimension, the intention of the Oireachtas is clear. The words of sub-s (2) mandate the solicitor to provide information to an authorised person, who may be a civil servant or an administrator who has no professional legal qualification, even though the solicitor has a duty of confidentiality to the client and the information is likely to be privileged, irrespective of the views of the solicitor as to whether it should be handed over or not and whether or not the client has given express informed consent, subject only to the proviso that the information is required by the Board for the purpose of enabling it to discharge its statutory functions.*

*Subject to one qualification, I find it impossible to conceive of a situation in which the disclosure involved in the implementation of the decision would in any way impact on the client interest which is protected by legal professional privilege. The qualification, which I advert to only because of the sweeping nature of the conclusion which I have just articulated, relates to the manner of implementation of the decision rather than the principle underlying the decision."*

***Mannion v Legal Aid Board & Others*** (Unreported Supreme Court, Hardiman, J. 26<sup>th</sup> February 2010: Unreported High Court, McGovern, J. 7<sup>th</sup> December 2007)

Ms Mannion sought various orders against the Board requiring the Board to assign a solicitor, other than a law centre solicitor, to her to enable her take legal proceedings



against the Board. The application was refused in the High Court and the decision of the High Court was affirmed by the Supreme Court on appeal.

In his judgement, McGovern, J stated:

*“I am satisfied that in this case there are sufficient safeguards for the applicant to ensure that the legal aid lawyers who are dealing with the application for legal aid will not have contact with those legal aid lawyers who are conducting the defence of the action against the first named respondent. It seems to me that the applicant’s apprehension is unnecessary and unreasonable in the light of the safeguards which have been put in place.”*

### **Challenges**

I have referred earlier to some of the changes that have take place in society and the implications for the Board of such changes. It is inevitable that we face further significant change and that the pace of change is increasing. Change can flow from the economic difficulties facing society and the public service; from changes in legislation, including for example the impact of the recently enacted Civil Partnership Act 2010; from technological developments, and changes in the expectations of the public as to the services being provided by organisations such as the Board. In addition, there have been major changes in family arrangements and a greater international dimension to legal service delivery.

I would like to refer to what I see as a number of particular challenges facing the Board at present and in the near future.

#### ***Greater focus on meeting needs of clients/alternatives to court***

There is a need for an increasing focus on meeting the needs of members of the public seeking legal services following a breakdown of a marriage. Many persons with family law problems require professional advice and assistance in resolving very serious personal and emotional problems. There is a perception that the only avenue available to persons in family breakdown situations is the traditional route of going to court and that the solicitor/barrister knows best. The client needs to be placed at the centre of the process and the focus should be on an outcome which best suits the individual circumstances of the client, rather than a court imposed solution, which often is not acceptable to either party. In many cases, they do not want to go to court and many are dissatisfied with the decision of a court or feel that they have been under unreasonable pressure when settling a case on the day of a hearing. There is also the question of potential long delays in having a case progressed where the court route is chosen. Accordingly, legal professionals will have to become more focused and innovative in seeking to address the needs of clients. This will involve consideration of alternative strategies for the delivery of appropriate legal services.

Experienced family law practitioners recognise that many of their clients do not want to go to court and would prefer if a less adversarial approach could be adopted to resolving their family law problems. It is recognised, of course, that a certain proportion of persons experiencing family law problems will require that their problem be adjudicated by a court and that others will seek to insist simply on their day in court.

What needs to change to move the legal profession towards a position where access to court is not the first impulsive reaction to seeking to resolve a legal problem? Many applications made to law centres are by persons, perhaps uninformed, who consider that court is the only option available to them. The Board has endeavoured to promote alternatives to court based solutions, but has had limited success. I would like to complement those solicitors who have made a collaborative approach an integral part of their skill set and who use such an approach on a regular basis for suitable clients. The feedback from the persons involved is very positive and the outcomes, not only in the legal sense but the personal benefits, are substantial.

The Board needs to identify and actively promote the use of alternatives to court. Arrangements need to be put in place to identify suitable cases for alternative dispute resolution mechanisms. This can range from collaborative law, the current model of which may need to be adapted to meet legal aid and Irish circumstances, to mediation, to a greater focus on legal negotiation as promoted by Mr Kevin Liston. The Board is working with the Family Support Agency and the Courts Service to introduce a pilot scheme for much closer cooperation to identify suitable persons to be referred to mediation and legal aid. A pilot project is being introduced in Dolphin House, Dublin next January. This will be monitored closely and should create a template for further use of mediation to help persons resolve their problems.

The Board is examining also the scope for using solicitors and barristers to mediate in appropriate legal aid cases. This could mean using trained law centre solicitors, or engage suitably trained solicitors or barristers under the legal advice provisions of the Act to test the potential benefits of using mediation rather than an adversarial process to resolve disputes.

The Board will need to develop more effective strategies for providing information about alternatives and encouraging legally aided applicants and staff to avail of options other than the court to seek to resolve problems.

### ***Family legislation and the court process***

I mentioned earlier when referring to the Airey case that one of the means of ensuring access to effective remedies was to simplify procedures.

In this regard, I would suggest that the Board must seek to become a key player in the development of an integrated family law strategy for this jurisdiction. There must be scope for a better arrangement to deal with fractured family relationships in a more sensitive and joined up manner than at present. The Board is ideally placed to lead this development: the solicitors working with the Board, and the Board as an organisation, are an invaluable source of expertise in family law, with a wealth of experience in advising and assisting clients. In a time of increasing pressure on public service organisations to reduce costs while continuing to provide services to the public, there is scope for novel and innovative approach in reviewing existing law and procedures.

It is time to proactively engage in a more robust review of family legislation and the practices and procedures of the courts to consider how responsive they are to the changing needs of society. We need to consider how best to streamline/simplify the

court process in family law matters. To what extent can the legal profession contribute to this development? In that context, there is a need to critically examine the legal system itself and how it approaches resolving family law problems.

We need to develop also greater interaction with our stakeholders to ensure that the service the client receives is the most appropriate to his/her needs and to create an honest realisation that a legal remedy is not always either necessary or desirable in resolving family law differences. It is essential, however, to develop approaches to dealing with family law cases that seek to make the transition from marriage breakdown to final formal separation as helpful as possible for the parties and ultimately for society generally.

There is ongoing reference to the cost of litigation and the level of fees paid to solicitors and barristers. While not seeking to defend the current level of fees, there is a need for simplifying the court process, procedures and the law to reduce the extent to which members of the public have to rely on solicitors/barristers when faced with legal problems. Is it the legislation, which provides two separate remedies for marriage breakdown – judicial separation and divorce – or the processes, or the lawyers that complicate matters, thus increasing fees and costs? Having regard to the financial implications for the Board, further consideration needs to be given to costs associated with providing legal aid for both judicial separation and divorce. It is planned that further analysis be undertaken of the implications of these remedies on the Board and the extent to which the Board funds both remedies for the same person over a period of time.

I refer back to the decision in the Airey case and, in particular, to the finding that the institution of a legal aid scheme constitutes one of the means of providing effective access to the courts. There are others such as the simplification of procedures. In the current financial circumstances that the Government faces, is there not scope for simplifying procedures to reduce the cost of litigation, or more perhaps correctly dispute resolution or problem solving?

### ***Resources***

At present and in the short term future, the Board is and will be faced with increased demand for its services while at the same time experiencing pressures arising from a reduction in staff levels as part of the moratorium on the filling of vacancies in the public service.

Under section 5 of the Civil Legal Aid Act, the Board is required to provide services within the resources available to it. A major challenge for the Board will be to prioritise its resources so as to provide a service in cases where representation is essential to ensure effective access to the courts. It is clear that the Board can determine the priority to be given to categories of cases as long as the approach is consistent and fair to all applicants. The Board is faced with situations where it cannot at present provide a timely service to all applicants. Waiting times and the number of persons waiting for services are increasing. The Board can just about manage at present, but future anticipated reductions in staff numbers will shortly create further difficulties for the Board. The challenge is to prioritise the use of resources so that the focus is on front line services and that among applicants for legal

services, priority can be given to the cases in which legal services are more essential or more urgent.

It will be clear from the decisions of the High Court in the Kavanagh and O'Donoghue cases referred to above that there is an obligation on the Board to provide services within its resources. In the current economic climate where Government is reducing resources available to the Board, consideration needs to be given to how the Board can provide services in a timely manner, generally regarded as within a period of two to four months from initial application. We are testing the benefits of providing a legal advice only service, but the continuing increase in demand will require further innovative approaches to be adapted by the Board. Should the Board decide to limit the categories of cases in which legal aid will be granted: or is it possible to adopt a more rigorous analysis of applications to identify cases where there is no alternative but to provide representation in court?

I refer again to the question posed by Kelly, J. in the O'Donoghue case when he asked "*Equally, how can the scheme be fair if a qualified person cannot get to see a solicitor for such a lengthy period?*" He was referring to a period of 25 months, but it raises the question as to what is a lengthy period for a person to be provided with legal advice. Having regard to the analysis in O'Donoghue, it is probably a reasonable short period and arguably not longer than four weeks, or less in more urgent cases. The challenge for the Board is how to address this requirement within the advice only service. Will it be necessary to expand the existing private practitioner service to provide assistance in this area?

In terms of making more effective use of its resources, the Board is in the process of integrating the RLS service into the general law centre service in Cork, Dublin and Galway. The integration will mean changes in the way services are delivered and also redirect resources to locations where the demand for services cannot be met from existing resources.

### ***Technology***

In the short term, the Board is in the process of procuring a new computerised legal case management system. This will require that all law centre staff use the new system and have the necessary skills to maximise the benefits of the planned technology. At present, specific training is being provided to upskill staff in preparation for the case management system. There will be significant change in the working arrangements in law centres together with an expectation that the system will contribute to more effective use of support staff and an increased throughput of cases.

The Board will have to ensure that the necessary resources are devoted to the development and testing of the system through its development life cycle in 2011. This is essential to ensure the successful implementation of the system.

The Board will have to adapt also to the needs for an increasing use of the electronic media for the provision of legal services. This will extend from making provision for applying for legal aid online, to greater use of electronic means of communication between solicitors and clients and other professionals. IT will be a tool for change in how law centres provide legal services. The anticipated reduction in data support collection and provision, together with reduced typing requirements will free up support staff

resources in law centres and create the scope for making more effective use of staff resources.

As a consequence, support staff will have to be upskilled to help deliver a service which is adaptable to the needs of the consumer and their greater expectations. In all such activities, the Board must emphasise the need to ensure a climate and expectation of excellence in service delivery.

### ***Improved operational arrangements***

There are a variety of challenges facing the Board in how it manages the arrangements for the delivery of services. There is a need to devolve greater decision making locally to ensure that local requirements are being met in a timely fashion. In addition, it is necessary to reassess the number of law centres and the point of application to see how we can best deliver the service. The current arrangements remain largely as introduced when the Board was established thirty years ago. These issues are constantly being examined in the Board, but the increasing focus on making the most of reducing resources requires that further consideration be given to the options available to the Board. Regard must be had to the improvements in communications and much more accessible transport arrangements than existed thirty years ago. In approaching how we arrange our services, the Board must recognise that the client is at the centre of its processes and that there is a need to build systems around the client.

### ***Criminal legal aid***

The Minister for Justice and Law Reform is considering the transfer of responsibility for the administration of criminal legal aid from the Department to the Board.

This would be a major challenge for the Board, both in the planning and organising for the initial transfer of responsibility and subsequently in the actual administration of the service. While there is an accumulated expertise within the Board on legal aid, there is no expertise and very little knowledge of criminal legal aid. The two systems are fundamentally different and the Board would face a difficult learning curve. Nevertheless, the Board would welcome the opportunity to play a lead role in the future development of the criminal legal aid service.

While we will have to await any Government decision in this regard, consideration will have to be given to the scope of the Board's responsibilities, as well as any arrangements for means testing. In addition, regard will need to be given as to how changes in the delivery of criminal legal aid might impact positively on the overall efficiencies of the court process. The Board will require the necessary resources to undertake whatever responsibilities are assigned to it. Failure to allocate appropriate resources, even if on an interim basis, will greatly hamper efforts to effectively manage the functions transferred to the Board. It is noted that expenditure on criminal legal aid is approximately €60 million per annum, apart from the costs of administration incurred by the Department and by the Financial Shared Services Office in Killarney that deals with the financial matters.

### *Conclusion*

The Board has made major strides in meeting the aspirations of those who campaigned for a civil legal aid service. The Board is now a very different organisation to that established in 1980. The success of the Board in providing a professional service to its clients is due largely to the commitment, dedication and enthusiasm of its staff. In common with many other persons in society, staff of the Board face their own particular problems in the current economic circumstances. Nevertheless, it behoves all of us to work together to provide a service to all applicants for legal aid. We need to continue to put the client at the centre of all that we do as an organisation.

Staff in law centres are at the front line in performing the functions of the Board. They are the persons who interact with clients, the Courts Service, the Judiciary and other professionals in a manner that has established the Board as a top class legal service provider.

END

## The Legal Aid Board

### ACHIEVEMENTS 1980-2010

- **1980: Initial launch of the Legal Aid Board** and successful implementation of the Scheme of Civil Legal Aid and Advice. Opening of seven original law centres.
- **Expansion of the service:**
  - o 1980: 7 law centres (Aston House, Limerick, Pope's Quay, Galway, Sligo, Waterford)
  - o 1986: 12 law centres (Ormond Quay, Athlone, Tralee, Tallaght, South Mall)
  - o 1991: 15 law centres (Castlebar, Letterkenny, Dundalk)
  - o 1997: 30 law centres
  - o 1999: Refugee Legal Service, providing legal services to asylum seekers, legal aid expanded to cover Refugee Appeals Tribunal hearings.
  - o 2000: Refugee Documentation Centre, library, information and query service for agencies in the refugee/asylum process.
  - o 2006: Medical Negligence Unit, specialist service in this difficult area.
  - o 2008: District Court Service, first centre co-located in a courthouse (Dolphin House).
  - o 2009: George's Lane Law Centre – possible new model of service provision.
  - o 2009: Board begins to provide legal advice in relation to human trafficking
- **1993:** First use of private practitioners (for District Court family law matters). Development plan put in place for expansion of the service.
- **1995:** Placing of Civil Legal Aid on a statutory footing: *Civil Legal Aid Act 1995*. Transition from administrative Board to statutory Board completed by 1996.
- **1999:** Government announces decision to relocate Board's Head Office to Cahirciveen. Majority of Head Office functions successfully relocated by 2002.
- **2001:** Piloting of private practitioners in Circuit Court cases.
- **2002:** Civil Legal Aid Regulations 2002: first review of regulations since statutory scheme introduced.
- **2006:** Circuit Court Private Practitioner Scheme introduced on a permanent basis.
- **2006:** Civil Legal Aid Regulations 2006: significant increase in eligibility limits along with simplified capital assessment, persons home no longer taken into account for purpose of assessing capital.
- **2008:** Board conducts and completes significant review of its service delivery through law centres. This was preceded by a review of the RLS in 2007 and followed by a review of head office functions in 2009.
- **2009:** Board receives recommendations of Anne Neary report on risk management in the Board and proceeds to implement them.