Legal aid and family law in Ireland

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Legal aid in Ireland is chaotic.

While Australia and the rest of the western world were restricting both funds and eligibility for civil legal aid during the 1990s, Ireland, whose civil legal aid is 97% devoted to family law matters, was expanding. At first glance, it might be supposed that the expansion of legal aid for family law matters in Ireland was a result of the introduction of legislation that for the first time allowed legal divorce in 1997. However, the reasons are more interesting and complex than this and need to be understood in terms of Ireland's history, politics and culture. Indeed these factors combine to ensure that civil legal aid in Ireland is in a state of perpetual chaos.1

The historical reasons are connected to the absence of divorce in the Republic of Ireland until 1997 which led to a lack of professional and government interest in the area of family law. However, the dominance of the legal profession in the dispensing of legal aid for criminal matters and Oireachtas' role in upholding the 1937 Constitution's ban on divorce and its support for marriage and family, have also been influential.2

Politically, all the parties, whether in government or not, have only been interested in the provision of civil legal aid as a means to other ends rather than, as in other countries, as part of a government obligation to provide a network of social services. For example, the legislation to finally provide civil legal aid in 1996 was stated by the minister responsible to be a vital measure to secure victory in the second referendum to allow divorce.3

Culturally, there are at least three elements which have contributed to the haphazard nature of civil legal aid in Ireland. First, the privacy of the family, as it is upheld in the Constitution, has meant that all governments have been loath to interfere with what was, in the past, the domain of the Catholic church.4 Second, the dominance of the rural economy until recently has meant that conservative values associated with families and land-holding have restricted the growth of socially liberal values. Both these cultural elements have also been a factor in the traditionally low status of women in Ireland which has only begun to change in recent times. As a result, the increase in women's status has been instrumental in increasing the demand for legal services, especially in the area of family law.

All these factors are part of the explanation for both the present chaotic nature of legal aid in Ireland and the consequent difficulty of reining in an ever increasing expenditure. Nevertheless, a strategic plan has been authorised by the Legal Aid Board and it is their hope that, within five years, the civil legal aid system will be rationalised. If this eventuates — and there are formidable obstacles to be overcome — Ireland may well follow the path of other countries in restricting the availability of legal aid for family law. I argue in this article, however, that five years may be too short a time for the massive cultural change required to make the divorce process cheaper and simpler and thus justify cutting back funding to civil legal aid.

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History of civil legal aid

Ireland has always been a reluctant provider of legal aid. In part this reluctance has been a result of slow economic development in the post-colonial period from the 1920s until the 1960s and lack of government interest in social welfare generally during that period. The introduction of civil legal aid has also been opposed by a powerful legal profession bent on protecting itself from government control of both its fees and its activities. For example, although a legal aid scheme for serious criminal matters was legislated for in 1962, it was not established until 1965 because the legal profession did not agree on the fees to be paid. In addition, a condition of implementing the scheme was that decision making on who would be given legal aid would be controlled by the judiciary and administered by the courts. This is still the situation in the criminal courts where there is no accountability to the government for their use of public funds.

In the civil jurisdiction the pro bono work undertaken by private solicitors and barristers was discretionary rather than through any coordinated effort by the professions as a whole. In the late 1960s a free legal advice and representation service was provided on a pro bono basis for civil matters—mostly family law—by young lawyers and law students in the poorer parts of Dublin. However, there was no government funded civil legal aid or advice service in Ireland until 1980, long after European, US and Australian schemes had established both in the post-WWII period.

Campaigns to provide civil legal aid and advice, particularly in relation to family law, began in the late 1960s but even after a government committee report in 1977 (the Pringle Committee Report) recommended the adoption of a comprehensive civil scheme, the Irish government did not act. It was not until an appeal to the European Court of Human Rights against the Irish government in 1979 was won by the claimants, Mrs Airey, that the government was forced to implement some form of legal aid for family law matters. Even then, though, it was only a trial scheme and that was established on an interim administrative basis. The 1980s were a difficult economic period for Ireland after a temporary boom in the mid-1960s and this led to cutbacks in welfare expenditures including the newly established Legal Aid Board. The lack of adequate funding led to long delays in getting access to legal aid. Cousins reports, for example, that services were totally suspended at times in order to clear the backlog of cases.

This on-again off-again situation did not improve until the early 1990s when, as part of a raft of government reforms to family law legislation, the Civil Legal Aid Act 1995 placed the scheme on a statutory footing. Despite the legislation, the structure of the scheme—which consisted of salaried lawyers providing advice and representation through a network of regional law centres—was not altered. Although the private legal professions had agreed to take part in a pilot scheme in 1993 whereby they undertook some legal aid work in family law, they withdrew from the agreement when the funding arrangement was announced. Once again, they considered the payments too low and discouraged their members from providing services. When the 1995 act came into operation in 1996, private profession payments were increased again by the Legal Aid Board but the Law Society still thought the payment inadequate and disagreed with fixed fees in principle. This standoff between the Legal Aid Board and the private profession still existed in 1999 and did not appear close to resolution. The Legal Aid Board, however, is able, as a result, to employ more salaried staff to provide both advice and representation. Furthermore, by not giving in to the profession’s demands they can, to some extent, control their costs.

Political influences

In the post-colonial period, successive Irish governments were dedicated to the ideal of building a Catholic state for a Catholic people. In the effort to distinguish itself as independent of its English colonial past, the Irish Constitution of 1937 included bans on abortion and divorce in compliance with the teaching of the Catholic church. In addition, it also included sections relating to the family, opposed by women at the time, which 'purposed to give women special recognition and protection, but actually reduced their rights as individuals'. The ban on divorce did not mean that marital breakdown was non-existent in Ireland but such was the stigma attached to separation that people left the country to divorce and remarried in England or elsewhere. The only other alternative was remaining together and living in secret misery. The official denial of marital breakdown also meant that the census did not include a category for separated people until 1979 when, even then, figures were far below those in other western countries. By 1981, however, these numbers had doubled and continued, in ensuing years, to increase.

Ireland’s isolation from the rest of the world began to change in the 1960s when it experienced its first taste of economic prosperity. This was also the period when legal aid was made a matter of right in grave criminal matters. It was the time also, towards the end of the decade, when young lawyers and law students dispensed, on a pro bono basis, advice and representation for civil, mostly family, law cases in newly established Free Legal Advice Centres (FLACs). Still the government did not want to acknowledge the need for any public funding of family matters. Family law itself was fragmented and discriminatory, there was no divorce as such although the more affluent sections of the population—a small minority at that time—were able to afford a fault-based divorce a mensa et thoro provided by the private legal profession at substantial cost to the parties. The Catholic church also conducted tribunals through which, in some circumstances, marriages could be annulled. Nullity could also be obtained through the courts but numbers of people pursuing this option have always been low. This meant that there was little or no recognition in either the church or the state of the legal problems facing increasing numbers of less well-off people involved in marital crisis. These were the people who were unable to afford legal remedies for matters ancillary to separation such as distribution of property, spousal and child maintenance, custody of children or domestic violence. The Airey case in 1979 changed all that and together with public figures demonstrating increasing marital breakdown, the government was forced to act. This was by now the 1980s and a time when public campaigns had begun for both a civil legal aid scheme and for a change to the Constitution on abortion and divorce.

Despite the 1980s being a period of economic restraint, the government held two referenda to change the bans on abortion and divorce contained in the Constitution. The first, in 1983, was to allow limited access to abortion and the second, in 1986, was to allow divorce. Both were soundly defeated. Post-referendum analysis on the divorce question revealed that the majority of voters against divorce (70%)
were justifiably anxious about a post-divorce world. This anxiety was generated not on religious grounds, necessarily, but more because there was no legal help currently available to negotiate separations, let alone divorce. It is a moot point whether or not the governments of the time saw the error of their respective ways in the wake of the referendum defeats, but it was certainly followed in the next nine years by a raft of reforming legislation. The reforms paved the way for not only establishing a civil legal aid scheme but also the winning of a second referendum on divorce in 1995, albeit by the narrowest of margins.

Apart from the Status of Children Act 1987 which regularised the legal status of non-marital children, the most important reform was the Judicial Separation Act 1989. It provided both fault and no-fault grounds for legal separation which allowed parties to apply to the court after 12 months apart or, if they still lived in the same house, they had had no normal marital relationship for at least a year. The most important part of these reforms, however, were the ancillary orders which could be made at the time of separation in relation to children, maintenance and property if the parties were unable to agree. The beginning of another economic boom in the early 1990s facilitated further reforms and consequent increases to the legal aid budget. These Acts increased social welfare payments for sole parents, combated the recently revealed high rates of domestic violence more effectively, provided protection of the family home and culminated in the civil legal aid legislation of 1996. Although the working of the scheme remained largely unchanged, it was now placed on a statutory footing for the first time. The Act was also unashamedly introduced into the Oireachtas in 1995 as part of a political strategy to hold another referendum on divorce later that year.

Cultural factors

A thread of social and cultural change is evident in both the historical and political stories of civil legal aid in Ireland. It nevertheless still warrants a closer look at these changes if we are to understand more fully the chaotic nature of legal aid in Ireland. There can be no doubt that membership of the European Union (EU) has had a significant influence on law and policy in Ireland. This is particularly true where women's issues are concerned and these are intimately connected to family policy, individual rights within the family and the provision of legal aid. It is also true that the Irish Constitution has been a stumbling block for Irish women's equality in a number of areas. These blocks included bans on abortion, contraceptives and divorce. In addition, Article 41's support for marriage and family including women's role within the family as wife and mother and the marriage bar which prevented women continuing to work in the civil service after marriage until 1960s, all conspired to lock women into the privacy of the family where they possessed little in the way of individual rights. Such economic dependency on men contributed to women's powerlessness within a patriarchal Irish state and concealed, for decades, high rates of domestic violence.

With the advent of EU membership in 1973, however, Ireland was obliged to conform to policies of equality between women and men — including equal pay provisions — or forego generous subsidies for its transition from a rural to a modern mixed economy. Ireland's membership of the European parliament has, as a result, not only broadened its approach to social policy but also provided an avenue of appeal to the European Court of Human Rights for all Irish citizens who are discriminated against in local legislation or policy. As a result of these opportunities, the status of women in Ireland has improved dramatically and they have become a vocal lobby group for change to social policy so long dominated by male nationalist interests. As has been demonstrated by the client base of the law centres funded even minimally by the 1980s civil legal aid scheme, the majority of claimants are women seeking relief from unsatisfactory marriages. For the first time in the law centres, they are treated as autonomous beings entitled to legal remedies rather than as appendages of their husbands' whim.

Spectacular economic growth in the 1990s has also contributed to more generous welfare provision although the provision of civil legal aid had to wait for a friendly minister in the 1993 change of government to have its funding similarly increased. This dependence on a 'friendly minister' for funding means that the ad hoc expansion of welfare and legal services is made in response to local and European pressures rather than as a state inspired and coordinated provision of services underpinned by issues of social justice. This means that legal aid funding can contract for the same reasons. However, this may be unlikely in the wake of the 1997 introduction of divorce and the raised consciousness of the citizenry as to their rights under the European Convention.

Although it would appear that there has been substantial cultural change in Ireland now that it has introduced divorce, this might be too hasty a conclusion. It needs to be remembered that 49.8% of the population voted against the constitutional change. In addition, the political compromises which had to be made for the referendum to succeed have resulted in a complex Act which requires legal and judicial interpretation. No-fault provisions exist but they are hedged around with fault grounds, a four-year separation period and a principle of no 'clean break' between the spouses. What this means is that separating couples almost certainly require legal advice and representation to negotiate the separation and divorce process as they have done since the Judicial Separation Act came into operation in 1989. Even though civil legal aid has expanded since that time, it has never been sufficient to accommodate the demand for services. This unmet demand during the 1990s has had a number of consequences.

Prior to divorce in 1997 and especially since the domestic violence legislation of 1976, 1981 and 1996, a two-tier system of de facto divorce had already developed. Women in domestic violence situations were able to seek a safety, barring or protection order in the District Court without having, necessarily, legal representation. The District Court was also able to make some ancillary orders for spousal and child maintenance at the same time. Emergency civil legal aid was available for these matters but there was a public perception that waiting lists were so long that it was not worth approaching a law centre for help. On the other hand, separating couples not suffering from domestic violence but unable to afford the Circuit Court process where a judicial separation is heard, were, on the basis of the same perception of long waiting lists, making their own agreements without the benefit of either legal advice or court applications.

Even with the high percentage increases to legal aid funds and an increased availability of a range of services, the two-tier system is said still to operate. Demand still outstrips the supply of civil legal aid and it is hard to see how this is going to diminish in the future even with the implementation
of 'strategic plans'. Long waiting periods from four to nine months for first appointments with legal aid solicitors are deterring people with urgent family problems from even registering with legal aid. Instead they are able to get help from district court clerks or legal executives to represent themselves when they seek a de facto separation in the form of barring or protection orders. What most people do when they separate, however, is come to a non-legal agreement between themselves about their children and financial matters without any help from the law. Most do not want to remarry quickly and they cannot in any case because the new divorce law requires a four-year separation period. That is too long to wait for ancillary matters to be decided. The outcome of this situation is that those people who have separated since 1997 and who can wait for legal aid are still using the 1989 Act to deal with the ancillary matters associated with separation.

The final anomaly in the chaos of the civil legal aid scheme is that aid is not available for divorce proceedings. It is a relatively simple matter for couples to do their own divorce if they have settled the ancillary matters but this is not well known. One of the problems here is that the legal aid scheme was set up there was no provision for the Legal Aid Board to be involved in community education. This inability of the Board to inform the public of their rights and entitlements was quite deliberate. The Irish government of the day had been bruised and embarrassed by its loss of cases in the European Court of Human Rights and viewed public legal education as a source of danger to their national status. In addition it might also be the case that the legal profession had a stake in maintaining their monopoly of legal knowledge.

However, seasoned divorce campaigners like Mags O'Brien who was the first person to obtain a divorce in 1997 by doing it herself for £25 had, in 1999, already helped many other women to do the same and was then preparing a book for publication. Nevertheless, she still saw problems ahead with people doing their own divorce because of a general cultural dependence on lawyers as well as women's traditional dependence on men. She thought that it would not be until women lost their fear of economic insecurity and broke free of their imprisonment in the family that attitudes to divorce would change. She perceived this change to be generational.

**Conclusion**

Civil legal aid in Ireland is chaotic because there has been and is no government overview of its introduction or maintenance. If the lobby group is loud enough, if the minister is sympathetic enough and economic times are good then funds will continue to be increased. However, as we have seen, this does not produce an even or satisfactory coverage of the population in terms of access to legal remedies. Separation or divorce is still readily available for those who can afford the minimum £1200–1500 fee for a lawyer to prepare a separation agreement and for those who can afford to wait for legal aid. Waiting lists for aid and again in the courts can be reduced with increased funding to both the Legal Aid Board as well as the judiciary and some of this has already happened. However, the legal profession's unwillingness to be involved in the process means there is still a long way to go before separating Irish couples can look forward to more accessible legal services.

Political manoeuvring to overturn the ban on divorce has produced an unnecessarily complex Act which still requires legal intervention to interpret and administer. No-one in the Irish government or legal profession has the energy or will to simplify the Act to the point where, as in Australia for example, divorce is a do-it-yourself affair supported by extensive counselling, conciliation and mediation services which allow 95–97% of the divorcing population to go their separate ways without litigation or the need for legal aid.

In addition, there is no divorce culture in Ireland as yet. The rush to the courts anticipated in 1997 has not eventuated and people as well as lawyers and judges are proceeding slowly to better gauge where the future lies. Meanwhile, as many people and professionals in Ireland readily admit, legal aid remains chaotic.

**References**

1. This was the considered judgement of a senior executive of the Legal Aid Board in Dublin in 1999 where the author interviewed a number of legal professionals as part of a larger study of family law reform in Ireland.

2. The Oireachtas is the parliament of the Republic of Ireland. It is comprised of the Dail (the lower house) and the Seanad (the upper house).

3. Cousins, M., "Legal Aid Reform in France and the Republic of Ireland in the 1990s" in Francis Regan, Alan Paterson, Tamara Gornley and Don Fleming (eds), The Transformation of Legal Aid, Oxford University Press, 1999, p.168.

4. There are a number of sections of the Irish Constitution which refer to the family and its place in Irish society; for example, article 41.3.1 reads: 'The state pledges itself to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack'. O'Brien reports that whenever a government has attempted to oppose or even modify the Constitutional ban on divorce they are quickly accused of anti-Catholic sentiments and denounced from the pulpit and within the Catholic press. O'Brien, Mags, Divorce? Facing the Issues of Marital Breakdown, Basement Press, 1995, pp.10-11.

5. Cousins, M., above, p.162.


7. This case arose out of a claim by Mrs Airey that the absence of legal aid in civil cases before the Irish courts was a breach of article 6, para. 1 of the European Convention which guarantees: 'in the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ...' (Series A No. 32 (1979) 2 ECHR 305 and (1981) 3 ECHR 592). Mrs Airey claimed that because of the prohibitive costs of litigation she was, in the absence of legal aid, denied access to the courts. Her claim was upheld. (1980) 10 Family Law 69.

8. Cousins, M., above, p.163.

9. Cousins, M., above.


11. O'Brien, Mags, above, ref 4, p.11.


18. A barring order, as the name suggests, removes the perpetrator from the home while a safety or protection order allows the perpetrator to stay in the home on condition that the violent behaviour stops. Wood and O'Shea, above, p.71.

19. The District Court in Ireland is the lowest in the court hierarchy and roughly equivalent to the Magistrates Court in Australia. The Circuit Court is equivalent to the Australian District Court, the High Court equivalent to the Supreme Court and the Supreme Court in Ireland is the highest court of appeal like the High Court in Australia.

20. There is no separate family court in Ireland and family matters must be listed, particularly on circuit to courts other than Dublin, with all other matters. In 1999 family hearings were usually listed last and often not dealt with in the time allowed for the court to sit in any region. This meant that in practice people might wait for months or over a year for their matter to be heard.