Public Interest Law in Ireland – the reality and the potential

Conference Proceedings

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Introduction

These conference proceedings, entitled *Public Interest Law – the Reality and the Potential,* represent the culmination of a research project into public interest law and litigation in Ireland and record a conference on public interest law which was held in the Royal Hospital Kilmainham on 6 October 2005.

As the large attendance at the conference and as subsequent inquiries to the FLAC office showed, there is a great deal of interest in the development of public interest law and litigation (PILL) in Ireland. FLAC will be facilitating a number of events over the next few months to continue the discussion on how to deliver public interest law and litigation.

We will organise a seminar for NGOs and interested lawyers on how PILL can address issues faced by disadvantaged and vulnerable groups. A seminar will follow on the procedural obstacles to PILL and the development of a strategy to remove them.

There will also be a seminar on structures in place in other jurisdictions to facilitate public interest litigation and a discussion as to their suitability in the Irish context.

Finally, in mid 2006, FLAC will host a major roundtable discussion on the possible shape and delivery of a PILL strategy.

Meanwhile, a consultant will be engaged to make concrete proposals on how PILL should be developed and supported in Ireland. FLAC will also establish a network of interested parties, individuals, NGOs, academics, the legal profession and others to discuss these issues. The network will involve experts from other jurisdictions as well.

FLAC hopes that this publication will contribute to the debate on the development of public interest law in Ireland and to a meaningful discussion on how we can make the law more accessible to disadvantaged people and use it to protect and extend their rights.

The publication of the conference proceedings has been funded by The Atlantic Philanthropies.

FLAC
February 2006

PROCEEDINGS OF PUBLIC INTEREST LAW CONFERENCE

2017

Opening Address

Noeline Blackwell, FLAC Director General

We are delighted and greatly heartened by the number of people who have registered their interest in this topic of public interest law in Ireland. Not only do we have a large number here but we also have a great mix of people. We have people from the state and semi-state sector, we have lawyers, practising lawyers at the Bar and solicitors and we have academic lawyers. We have students and we have people who are working with those who are marginalised because of lack of access to justice and those who are particularly vulnerable. We have people from civil society generally. We welcome you all here today.

What we will be looking at is how law is currently used in the public interest in Ireland, how litigation is currently being used and its potential for use in the future.

FLAC in particular welcomes today its supporters and volunteers. At some stage during the day we are also going to have the pleasure of welcoming David Byrne, a noted lawyer, former EU Commissioner, former Attorney General and founder member of FLAC. It is just extraordinary that we have people working with FLAC – him and others – over the entire time of its existence, over thirty-five years, who are still interested in new developments in which FLAC is interested.

FLAC is – for those who do not know us - an independent human rights organisation. Our main aim and ambition is to achieve equal access to justice for all. Since its foundation, FLAC has campaigned for a legal aid system to give access to justice to those who can not get it for lack of resources. Over the years FLAC has also sought to represent or resource those who otherwise would not have been able to go to court to vindicate their rights. With the assistance of our dedicated and able volunteers, we work in our own office and with Citizens Information Centres around the country to provide legal advice for individual legal problems.

Those initiatives have been aimed at increasing the access of individuals to justice. In addition FLAC has promoted and encouraged the delivery of law through community law centres in recognition of the fact that services designed by the community, with the community's interest at heart, are those most likely to deliver effective access to justice, something which is particularly true for marginalised communities.

This current project, where we examine how law and litigation are used in the public interest, and how they could be used, is geared at examining another aspect of equal access to justice for all. With funding from The Atlantic Philanthropies we were able to commission Mel Cousins to do an assessment of public interest law and litigation in Ireland. Mel will present his main conclusions here today.

There is already substantial law and litigation practised in this state in the public interest. We hope that today will be instructive for those engaged in that work, of whom several are here today, along with those who wonder what relevance the law has for them in their work with people who have trouble accessing justice. We hope that this conference will be useful in developing a common understanding of what public interest law and litigation means and exploring its uses and potential. We think that the contributions that you will hear today from those who work with public interest law and elsewhere will be particularly enriching. Though working in very different fields, the group of speakers we have gathered from abroad work in systems that are based, like our own, on the common law system, which is more useful for us than other systems such as those in mainland Europe.

We are grateful to Judge McGuinness who has agreed to chair this conference here today. As an advocate and a judge she is held in the highest esteem. Her biography is in the notes. I think she is the only judge that I have come across who has sat as a judge in the Circuit Court, the High Court and the Supreme Court, so she has an unrivalled wealth of experience across the courts in Ireland and also has wide experience from her previous practice as a barrister.

As well as that she has an extremely wide variety of interest and understanding in how to use law in the public interest. I am delighted at this point to hand the conference over to her.

Thank you very much indeed.

Opening Address

The Honourable Mrs Justice Catherine McGuinness
President of the Law Reform Commission
Conference Chairperson

I would like to echo Noeline's welcome to everyone here this morning. It is really encouraging to see what a large public interest there is in public interest law in Ireland and in this city. You can see from the programme that we have an enormously full programme of speakers and I intend to interpret my role as chairperson very strictly. I am here, as it were, to keep the proceedings going and not so much to put in my own opinions.

I would like to say that it is a particular interest to me as President of the Law Reform Commission to be chairing this meeting and to hear these contributions with regard to public interest law. It is particularly apt at the moment as the Law Reform Commission has only just recently published its report on multi-party actions. Multi-party litigation, we see as a way of offering access to justice, very often in cases that may represent the public interest, or groups that otherwise would not have access to justice. So it seems to me that this fits in extremely well with what we have been trying to do in the Commission.

As I have said there are a great many speakers. You have all been given notes on their careers and the various distinctions that they have achieved. Because the time is so tight and is so short for everyone, it would seen to be a waste of the speakers time if I was to go over all these notes introducing each speaker. I am sure the speakers as a whole will forgive me if what I do is simply announce them very shortly and leave it to you to read all about their careers in the notes that you have been given.

Presentation

Dr Maurice Manning
President Irish Human Rights Commission

Well I find myself in a slightly difficult situation in that according to your programme I am to launch Mel Cousins' report but for reasons you have heard the report will not be available for a little time yet.[1] So I am not sure whether I am doing a launch or a non-launch and I suppose the only difference between a launch and a non-launch will be the amount of time involved. It will be a brief contribution, which should please the chair, as according to the schedule, I should have finished five minutes ago.

I have had the opportunity to read the report and to listen to what Mel had to say here this morning. The report is really a model of its kind, it is both analytical and prescriptive and I think the prescriptive part is going to be of great importance because the first thing that strikes anybody in looking at the whole question of Public Interest Law in Ireland is that, and as Mel has pointed out, there is very little known about it. If you stopped ten people on the street today and asked them what Public Interest Law was, very few would know. And it is not just the general public. I think even amongst the media, the policy makers, and probably amongst many lawyers, that there is not a very good sense of what Public Interest Law is and one of the great values of the written word in Mel's report is that there is great clarity of definition describing just what it is, what is involved and what is not involved in Public Interest Law. And I think that one of the tasks and one of the reasons why this conference today is so timely is that the time is right in this country for a major leap forward.

We are starting from a very low base, as pointed out by Mel. There has not been a great tradition and the structures do not really exist and there is a great deal to be done. Nonetheless, the first task and it will flow from this conference, is a raising of an awareness generally and a spreading out from

this hall of just what is the full potential of the development of Public Interest Law. The fact that we have started late may not necessarily be a disadvantage, there are many models available to us, there are examples from other jurisdictions, from where the speakers of this conference are from, of how progress can be made.

Mel in his paper has identified the obstacles but I think that when we look at them they are not really insurmountable; yes, cost, cost, cost, but that is not an insurmountable obstacle. There is the question of judicial attitudes, fears and so forth. But I think when one reads the report, while one sees that there are obstacles they should not be seen as holding back real progress.

One of the strongest aspects of the report is that it does offer a structured programme for action. It lays down in very detailed ways just how it is that progress can be made and he issues a number of challenges. I will not repeat them here but one or two of them struck me in particular. One is a challenge to the law schools who I think are all represented at this conference. Making the point that individual members of law schools may well have links to the disadvantaged sections of the community; the law schools themselves do not. There may have been a lack of leadership from the law schools in the past and certainly it is a challenge.

Also upon Mel's challenge on *pro bono* work and I know he did talk of the strong traditions of the Irish Bar and the Irish legal profession in *pro bono* work, and I am sure that this is true. But certainly there would be a perception that too much of the pro bono work is carried out by small practitioners and that the big firms do not do their fair share, whatever that fair share might be. Perhaps the bigger firms are too often driven by bottom line considerations and that the traditions of *pro bono* work do not reach in. I may be wrong but certainly that would be the perception and there is a challenge in the report to especially the bigger firms because we all know so many of the often sole practitioners or small firms who do engage in significant *pro bono* work.

But, as I say, this report when you get it will be worth waiting for, because not alone is it analytical, but it provides a very definite programme for action. It is a way forward and it shows how progress can be made towards achieving the type of objectives which have brought everyone to this conference. And I was very interested in passing by the very positive note that he struck on the use of the Oireachtas committees. I remember when the Oireachtas committees were in their early stages, one of the hopes was that they would become an interface for groups who wanted to put their point across to those who are actually making the legislation. And it is my experience from leaving politics that Oireachtas Committees do welcome and do listen to NGOs and other groups so perhaps I would give even more emphasis than Mel has done to the use of the Oireachtas committees in developing Public Interest Law.

May I conclude, Chair, by saying that I welcome the report and I hope it will not gather dust and it will be a basis for action.

1 Mel Cousins' report had not been finalised at the date of the conference, so he presented a summary of his research and conclusions instead. The final version of the report is contained in Part I of this publication.

How public interest law and litigation can make a difference to marginalised and vulnerable groups in Ireland

Mel Cousins

Introduction

This paper is based on the findings of a research project commissioned by FLAC (Free Legal Advice Centres) and funded by the Atlantic Philanthropies. The purpose of the research was to examine the potential role of public interest law and litigation in improving the position of disadvantaged and vulnerable groups in Irish society.

Defining Public Interest Law and Litigation

PILL is not a term which is very familiar in an Irish context. Public interest law is not a field of law in the normal sense of the term (i.e. such as, for example, family or company law). Rather it is a way of working with the law for the benefit of vulnerable and disadvantaged people. In the literature there is no one precise definition of public interest law which is widely accepted. Indeed, the meaning of the term is influenced by the legal and political culture of the society in which it operates.

Drawing on existing literature, public interest law involves

1) ***Law reform*** – this can include research on issues of concern, developing reform proposals, lobbying and campaigning;
2) ***Legal education*** – this involves incorporating an awareness of public interest into third level and professional legal education through, for example, the teaching of public interest law or the development of clinical (i.e. practical) legal education as a structured part of the course of education;
3) ***Community legal education*** – this involves a range of measures to 'demystify' the law and to raise awareness of the law amongst disadvantaged and vulnerable people. Examples include the provision of information materials (in print or on-line); community legal education projects, training, 'Street law' programmes in the USA and elsewhere which use law students to deliver legal education to members of the public;
4) ***Public interest litigation*** – this involves the use of litigation (i.e. the process of bringing a case to court) in a strategic manner to advance the position of disadvantaged and vulnerable groups. It involves a wide range of activities from the identification of an issue, identification of potential cases, preliminary advice, bringing of the case itself, and the implementation of the court's decision.

It should be noted that public interest law is not synonymous with pro bono work carried out by the legal professions. Despite the similarity in terms (pro bono publico meaning 'for the public good'), pro bono work may include 'public interest' work in the sense used here but will frequently be for a mainly private benefit. Conversely, some public interest work may be carried out on a pro bono basis but much will be paid.

Thus, for the purposes of this research, we understand 'public interest law' to be a way of working with the law for the benefit of vulnerable and disadvantaged people while 'public interest litigation' is one of the methods of implementing this approach.

Role of and rationale for PILL

Support for public interest law and litigation is premised on the assumption that it is legitimate to use the legal system and the courts to advance the position of disadvantaged and vulnerable

groups in Irish society. It is important to ask whether this is a valid assumption. It is sometimes suggested that reliance on the courts undermines the democratic system. However, insofar as PILL is concerned, this is a mistaken argument.

PILL in its broader definition does not specifically involve the courts but rather assists disadvantaged and vulnerable people in having an input into the democratic process through, for example, being involved in a process of law reform or by participating more fully in the outputs of the legislative process (i.e. by being more fully aware of rights and responsibilities created by legislation).

Insofar as public interest litigation does directly involve the courts, the use of the courts to advance the position of disadvantaged and vulnerable groups can be seen as perfecting the democratic process rather than as a challenge to it. Our constitutional system of government is based on the separation of powers between the legislature, executive and the judiciary. An essential part of the separation of powers is the operation of a system of checks and balances between the different arms of government. It is important that the role of the executive in, for example, implementing legislation should be checked both by its responsibility to the legislative branch (the Oireachtas) and by being subject to review by the judiciary. Similarly, the legislation adopted by the Oireachtas must be subject to review by the courts to ensure that legislation complies with the requirements of the Constitution.

An example of the need for such checks and balances is the recent nursing home issue where it was found that certain charges for public nursing home care were unlawful. This practice had gone on over a number of decades leading to a very significant amount of arrears being owed to the individuals affected. A proactive public interest law approach could have led to this issue being highlighted and resolved at a much earlier stage to the ultimate benefit of all concerned.

The operation of this system of checks and balances simply involves the application of our established Constitutional system of government. Other sections of the community, such as, for example, the business community, have ready access to the courts where their interests are at stake. It is essential for the balanced operation of our democracy that all sections of the community (including disadvantaged and vulnerable groups) should also be able to ask the courts to review the actions (or inaction) of the other arms of government or to resolve disputes with other parties.

Public Interest Law in Ireland

The development of public interest law and litigation (although the term itself is not widely used) has been extensively documented in Gerry Whyte's excellent publication *Social Inclusion and the Legal System*. In his overall evaluation of public interest litigation in a number of different areas Whyte finds that

- In the area of social welfare, public interest litigation has been 'effective in protecting the procedural rights of welfare claimants and occasionally effective in removing anomalies from the system but generally [did] not improve access to welfare income for disadvantaged individuals or groups in any significant way';
- In the area of children's rights, 'it has produced beneficial, tangible results, particularly in relation to meeting the educational needs of children with learning difficulties';
- In relation to Travellers' rights, litigation 'produced some limited gains for Travellers';
- Finally, 'the pursuit of a litigation strategy to enhance access to legal services … had mixed results' resulting in the significant expansion of the criminal legal aid scheme and arguably being an important factor leading to the introduction of civil legal aid but contributing to the fact that the latter was bereft of any strategic element for tackling social exclusion.

Whyte emphasised that while 'not a universal panacea for the social problems of our country', public interest litigation could achieve significant results. However, he found that 'litigation, in isolation, is rarely sufficient' and that engagement with the political and bureaucratic system, such as lobbying for law reform, is also essential.

Whyte outlines how the attitude of successive governments to issues concerning 'access to justice' has been cautious (if not hostile) and how the civil legal aid scheme has, over a long period of time, been both narrowly defined in terms of the work it can carry out and inadequately resourced.

Current status of PILL in Ireland

1) ***Law reform***

Generally speaking, NGOs interviewed reported positively on the current process of law reform. Most reported that departments were prepared to meet with them to discuss issues in the process of preparing law reform proposals. Equally, NGOs generally commented favourably on the fact that Oireachtas committees (and individual members of the Oireachtas) were prepared to meet with them and to discuss their concerns.

Few NGOs had much (or any) contact with the Law Reform Commission. This is perhaps unsurprising given its limited functions. However, it does appear that the focus of the Commission is very much on the legal - rather than social – aspects of law reform. While the Commission involves a wide range of groups in its deliberations, the focus is very much on legal expertise rather than on consultation with NGOs from a broader policy perspective. The Commission did recently organise a public meeting in Ballymun to discuss its proposals on cohabitation and this represents a welcome development of its normal working methods. The South African Law Reform Commission appears to take a much more 'social' and proactive approach to its work and might serve as a useful model.

In summary, NGOs reported quite a positive experience of the law reform process from the point of view that they were able to make their views heard in the process - emphasising that this does not necessarily mean that their preferred position was reflected in the final outcome. However, it seems clear that the less well organised and resourced the organisation, the greater the difficulty it will have in developing proposals. While most groups interviewed were well able to identify key issues and to make proposals for reform, these were frequently of a somewhat general nature. Many NGOs, particularly those without legal staff, indicated that they were not necessarily able to analyse an issue from a legal perspective or to prepare detailed legal reform proposals.

2) ***Legal education***

There is a very limited focus on public interest law in many of Ireland's universities and professional law schools. Several law schools do teach subjects in the general area of public interest law. For example Trinity College has a public interest law course while NUI Galway has a particular focus on disability law. However, in most law schools, the focus on public interest law is quite limited.

UCC is currently beginning a BCL (clinical legal education) in which students who opt to participate will spend a year working externally with organisations including the Legal Aid Board, the DPP, and the UNHCR. NUI Galway is also in the process of developing clinical legal education as a structured part of its law degree. It is anticipated that work placements for academic credit will be made available on a pilot basis to 35-40 final year students in BCL in the academic year 2006-07. At present a database of potential employers is being developed which will include NGOs working with disadvantaged groups and solicitors.

The recent report of the Competition Authority on the legal profession also has implications in this area. The Authority recommends the abolition of the educational monopolies enjoyed by the Kings Inns and the Law Society in respect of professional legal education. If implemented, this recommendation would mean that other educational providers could be involved in the provision of professional legal education and might increase the relevance of the clinical legal education approach.

There are few (if any) structured links between law schools and NGOs involved in public interest law issues. Insofar as such links do exist they are very much of a personal nature with individual law lecturers and, consequently, likely to cease where a lecturer moves on.

Finally, the number of persons from disadvantaged and vulnerable backgrounds who undergo legal studies at undergraduate or professional level is very low.

Overall, this means that the persons qualifying with law degrees or as lawyers tend to be from better-off backgrounds, that they receive very limited exposure to public interest law issues during their third level and profession training; and, conversely, that very few persons from disadvantaged and vulnerable backgrounds qualify as lawyers. In addition, the very significant resources of law schools in terms of ability and expertise (on public interest law) are not made available to the wider community in any structured manner.

Interviewees suggested that there was a need to address all the issues outlined above: first by taking steps to increase the proportion of people from disadvantaged communities undergoing legal training; secondly by increasing the teaching of public interest law issues within law schools (including professional law schools); and finally, by developing more structured linkages between the law schools and, for example, independent law centres.

There are currently a number of interesting initiatives in this area including

- the development of clinical legal education in UCC and NUI Galway,
- the establishment of the LEAP (Legal Education for All Project) involving ITM, Ballymun Community Law Centre, Northside Community Law Centre, the Immigrant Council and Trinity College Dublin.

In addition, one way of providing a co-ordinated response to the different issues discussed in this section would be the establishment of a centre for Public Interest Law which would:

- Research public interest law issues, particularly in a comparative legal context;
- Provide advice and support to independent law centres (and possibly to others involved in the area) on PILL;
- Further develop links with community groups to support the provision of community legal education;
- Teach public interest law to law students.

3) *Community legal education*

Community legal education involves the provision of information and education on the law (including legal rights and responsibilities) to the general public and, in particular, to disadvantaged and vulnerable groups. There is very little provision of community legal education in Ireland at present. Many of the independent law centres are involved in the provision of talks and information leaflets about specific legal topics. In addition, Comhairle and the Citizens Information Centres which it supports are heavily involved in the provision of citizens' information. However, this tends to be general rather than specifically legal information.

The LEAP project, referred to above, is a very interesting example of an innovative project bringing together a range of organisations to provide legal education to disadvantaged

groups. A further innovative example is the Participation and the Practice of Rights project in the areas of north inner city Dublin and Belfast. Both projects are practical attempts to increase the legal knowledge and skills of people from disadvantaged and vulnerable communities.

In discussions with NGOs there was a very high level of demand for community legal education in a variety of forms from basic information to more in-depth training courses.

4) *Litigation*

Finally, we look at the current situation concerning public interest litigation. As part of the research, a research study examined all written decisions of the High and Supreme Courts in 2003 and 2004 to identify the proportion of public interest cases. The definition of public interest cases was adapted from a somewhat similar study carried out in the UK by the Public Law Project:

> Cases which raise issues, beyond any personal interests of the parties in the matter, affecting identifiable sectors of the public or vulnerable groups;
> seeking to clarify or challenge important questions of law;
> involving serious matters of public policy or general public concern;
> and/or concerning systematic default or abuse by a public body.

In total, over the two years, only 33 judgements were found to fall within the definition of public interest litigation as outlined above. This means that only 3.5% of all written judgements from the High and Supreme Courts in 2003 and 2004 involved public interest litigation (as defined). While the number of public interest cases identified obviously depends on the precise definition chosen, this does indicate a rather low level of public interest type litigation in Ireland. A slightly broader definition of public interest would not significantly increase this level.

This impression of a rather low level of public interest litigation was supported by interviews. Generally speaking, the independent law centres, which have a wide range of other responsibilities, are involved in little public interest litigation. Private practitioners indicated that public interest litigation is concentrated amongst a rather small number of solicitors offices and generally in small to medium size firms.

Unfortunately, there does not appear to have been a comparable study of the level of public interest litigation in other jurisdictions. However, interviews with respondents in the UK and Northern Ireland would suggest that there is a significantly higher level of public interest litigation in neighbouring jurisdictions.

A number of respondents with experience both in Ireland and in neighbouring jurisdictions also expressed the view that public interest litigation was comparatively underdeveloped in Ireland.

However, the priorities of those non-legal NGOs interviewed were primarily in the area of assistance with law reform and community legal education rather than with public interest litigation. In general, this was due to the fact that, while groups might have identified a potential legal issue, they did not have the expertise to analyse it and establish whether there might be a legal remedy to the problem and, if so, whether litigation might be a viable avenue.

Government and legal sector policy

1) *Government*

Unsurprisingly, given that the concept is not a commonly used one in an Irish context, the Irish government does not have an officially established policy on PILL. Thus policy has to be

identified in the different areas coming within the definition. And, of course, policy often varies between government departments and other public agencies.

Law reform – Generally, government encourages consultation with and involvement of NGOs in relation to the development of policies (i.e. law reform). Based on the generally positive response from NGOs, this policy would appear to be generally implemented in practice. However, government does not generally provide resources for legal research into issues of law reform although individual groups may be able to access specific resources under specific headings.

Legal education – There is little explicit policy in this area and the content of legal education is largely left to the individual law schools. In recent years, the Department of Education and Science and the Higher Education Authority has emphasised the importance of improving access to third level education for disadvantaged groups, for example, through funding third level access programmes. In general, these are not focused on specific areas such as legal studies.

Community Legal Education – As in the UK, there is an absence of any clear or comprehensive policy on community legal education. The provision of 'citizens' information' (which is a related area) has been developed greatly in the last decade through the expansion of Comhairle, the development of a citizen information database (Oasis) and the development of local citizen information services. These are supported by funding from the Department of Social and Family Affairs. However, there is little funding or support for more specific legal education.

Litigation – While there is no specific policy on this topic, the general perception amongst respondents would be that government would be less than enthusiastic about supporting public interest litigation (in part because public bodies are often the defendants in such litigation). The longstanding reluctance to provide adequate funding for civil legal aid (albeit that resources have increased significantly in recent years) and the oft-stated concerns about providing a rights-based approach to the provision of disability services would all suggest that government might be expected to have reservations about public interest litigation. Having said that, a number of public bodies such as the Equality Authority are already involved in public interest litigation and it is likely that the Irish Human Rights Commission will increasingly be involved in such litigation in the future.

2) *Legal professions*

Bar Council

The Bar Council has recently established a *Voluntary Assistance* scheme which has very significant potential to make a major contribution in the area of public interest law and litigation. The Bar has established a list of barristers prepared to provide *pro bono* services. Unlike the traditional *pro bono* approach, however, this is focussed on voluntary organisations (rather than individuals). Nor is it confined to legal representation but can also be adapted to meet the needs of NGOs. So, for example, it might involve training in advocacy skills so that the staff of an NGO could represent persons before an administrative tribunal, or the development of law reform proposals. To date it appears that the take-up of this service has been slow. The consultation process indicated that this was a key issue to be addressed if the scheme is to operate to its full potential. NGOs are not aware of the scheme and even when made aware the lack of any previous experience of direct contact with the Bar Council is likely to inhibit take-up.

Law Society

The Law Society has no specific policy on public interest law litigation. It does not have a public interest law committee. A pro bono scheme was considered by a committee in recent years but nothing was agreed. The Society does organise occasional conferences in areas relevant to public interest law such as immigration law.

Capacity to pursue PILL strategy

As set out above, the current provision of and approach to PILL is at an early stage of development. In most cases, there is no clear policy support for PILL from government or the legal profession. The main source of public interest litigation is currently private solicitors (generally from small-medium size firms). The independent law centres are involved in a variety of activities in the area of PILL but most are small and many have somewhat insecure or inadequate funding. Overall, there is currently limited capacity to pursue a PILL strategy and there is a need for strategic investment in the area if such a strategy is to develop.

Overall this research finds that public interest law and litigation (and its component parts) are at an early stage of development in Ireland. There is limited explicit public policy in the key areas although the Bar Council has recently introduced a potentially important *Voluntary Assistance* scheme and individual members of the legal professions make a vital contribution through their *pro bono* involvement in public interest litigation. There is significant demand and support for the further development of the different aspects of a PILL approach from NGOs and individuals.

Public Interest Litigation

Insofar as public interest litigation is being carried out in Ireland, the vast bulk of cases are being brought by solicitors in private practice. In general, public interest litigation tends to be brought by a relatively small number of solicitors and is heavily focussed on small-medium sized firms. The independent law centres have a wider role than simply litigation and many are involved in wider PILL activities. However, perhaps unsurprisingly given their limited resources, their contribution to the overall level of public interest litigation in Ireland is currently very limited. The state-funded Legal Aid Board also has a limited involvement in public interest litigation due to the fact that its work is focussed primarily on individual family law casework.

Does litigation have a role in advancing the position of disadvantaged groups?

The overwhelming reaction of interviewees was that public interest litigation could have a role in advancing the position of disadvantaged and vulnerable groups. This is not, of course to say that all cases brought were 'successful'. However, interviewees -who all had considerable practical experience of bringing cases - all felt that the courts did have a role to play in this area and most pointed to areas where they felt there was potential to bring further cases.

Volume of cases

Some respondents reported a dramatic increase in the volume of cases, e.g. in the areas of refugee and immigration law. Others, however, reported that certain cases had declined in recent years in part as a result of the *Sinnott* case and similar decisions.

Type of cases

Lawyers interviewed were involved in public interest litigation in a very wide range of areas including children's rights and education, refugee and immigration law, Traveller's issues, criminal law and prisoners' rights, public housing, right to home births, inquests, rights of homosexual persons, and the right to legal aid.

Unmet demand?

Most interviewees felt that there was considerable 'unmet demand' for representation in relation to public interest issues.

Barriers to public interest litigation

Costs

The primary barrier mentioned in bringing public interest litigation was undoubtedly the cost involved. Issues in relation to costs came under a number of different headings including the lawyers' costs, the risk of costs being awarded against the client, difficulties in recovering costs, and costs of expert witnesses.

i) Lawyers' costs - In the case of the private solicitors, clients involved in public interest litigation were generally not in a position to meet the costs involved (or at least not the full costs). Accordingly, solicitors operated either on a *pro bono* (no foal no fee) basis or charged a relatively nominal amount. The method of operation is clearly financially dependent on achieving a sufficiently high success rate to meet the costs involved in all the cases brought. Accordingly solicitors generally reported that they carefully vetted cases to ensure that they had, in general, some reasonable prospect of success.

In the case of barristers' costs, there was some difference of perception between solicitor and barrister interviewees. In general barristers, and it should be recalled that these were all barristers involved in public interest litigation, considered that barristers were prepared to take-on public interest cases without any guarantee of payment. Solicitors generally agreed that it was possible to obtain the services of a barrister for public interest work. However, a number of solicitors suggested that while willing to act, unpaid barristers were perhaps unable to give the same degree of commitment to a case that they would if guaranteed payment. A number suggested that they would like to be able to guarantee some level of payment to a barrister (although not the full commercial rate).

In the vast majority of cases brought by private solicitors, there was no public financial support for the cases. This is clearly a very significant difference to the position in the United Kingdom where legal aid is available for many public interest type cases.

In the case of independent law centres, the costs of core staff were, in general met from public funds, However, a number of the law centres considered that the level of resourcing which they received was inadequate to meet the demand for their services (including in the area of public interest litigation).

ii) Client costs - A number of respondents reported that the prospect of having to meet the costs of the case (in particular the costs of the other side) if the case was unsuccessful was a deterrent to some clients bringing cases. Respondents generally reported that the state was more likely to seek and the judiciary to award costs against an unsuccessful litigant (even where the case was broadly a public interest issue) than they would have been in the past. Given the cost of litigation, this could represent a very significant cost to the individual concerned.

iii) Issues in recovering costs - A number of independent law centres expressed concerns that they might have difficulty in recovering costs against the other side even in a successful case. This is on the basis that such law centres would not in general charge their clients for their services and that, therefore, as the client had no exposure to costs, the other side was not responsible for the costs incurred.

iv) Costs of expert witnesses, reports, etc. - Both private and independent law centre solicitors reported difficulties in arranging for expert witnesses and related issues (e.g. reports, interpreters, etc.). In the case of private solicitors, while prepared to act without payment on a 'no foal, no fee' basis, they were more reluctant to fund additional costs of the litigation. Similarly, while the staff and administrative costs of independent law centres were met, in some cases additional litigation funds were very limited. Respondents reported that the pro bono tradition which exists in the legal profession was not generally to be found in other professions and that the clients involved were often not (or only with great difficulty) able to meet the outlays involved.

Linking persons with a 'legal' issue to legal services

A number of respondents reported that clients were understandably reluctant to get involved in the somewhat complex, stressful and unfamiliar process of bringing legal proceedings. In addition to concerns about costs, mentioned above, some clients were deterred by the

complexity of the process, by concerns that bringing a case against a public body might rebound on them in future dealings with that body and because of legal issues concerning their status (e.g. illegal workers).

In addition, some respondents reported that in some cases where they had identified a legal issue, it proved difficult to find a suitable plaintiff to bring a legal challenge either because possible plaintiffs were deterred from bringing cases for the reasons discussed above, because possible plaintiffs simply moved away (recall that much public interest litigation involves highly mobile groups such as migrants and Travellers), or that the background of potential plaintiffs made them a less than optimum choice for a test case (e.g. persons with a previous criminal record).

One practical difficulty in bringing public interest litigation is that of making the link between the individual or group with a problem and the legal services which could assist in resolving that problem. In the case of private solicitors, it was clear that these links currently operated on a very ad hoc basis. Clients became aware of services largely through word-of-mouth by referral from other persons using the services, from other solicitors or from NGOs. The solicitors interviewed appeared to have little difficulty in finding clients but there may well be other solicitors prepared to offer similar services who were less well able to do so and clients may be unable to find solicitors willing to take their cases. There appeared to be limited communication between solicitors working in relatively new areas of law (such as refugee and immigration law) and the Law Society appears to provide limited (if any) support at present.

In the case of independent law centres, referral also appeared to operate on a somewhat ad hoc basis. Some law centres are area-based whereas others focus on specific issues. There is a considerable difference between the situation in this jurisdiction and that in the UK. In the UK, legal NGOs tend to be long established and reasonably well resourced. Organisations interviewed appeared to have clearly defined areas of work in which they would provide advice or assistance and these policies appeared to be known to other legal NGOs. In other words, UK legal NGOs had developed clear policies specialising in specific policy areas and these were widely known. In Ireland, independent law centres tend to be much smaller, often recently established and less well resourced.

Judicial attitudes

Respondents differed significantly in their views on judicial attitudes. Some felt that judges tended to be strongly pro-defendant (where the defendant was a public body) and to allow flexibility to public authorities which would not be extended to members of the public and/or not to be open to social reform. Others reported no barriers to public interest litigation from judicial attitudes. Others again reported varying attitudes depending on the member of the judiciary encountered.

More broadly a number of respondents referred to the fact that the approach adopted by the Supreme Court in the *Sinnott* case limited the scope of significant public interest litigation. Others, however, while acknowledging the limits imposed by *Sinnott* felt that there remained considerable scope within those limits.

Procedural issues

There are a number of potential procedural barriers - such as the absence of anything akin to a class action procedure under Irish law - to bringing public interest litigation. However, these rarely emerged in interviews as being important in an Irish context. This may well be due to the relatively early stage of development of public interest litigation in Ireland. It may well be that if a greater volume of such cases was being brought, then procedural issues might emerge as being of great concern.

One procedural issue which was raised was the possibility of having a moot point determined by the courts. It has been suggested that public bodies may choose to settle a case which they

feel they will lose so as to avoid the possibility of a court ruling. Thus although the individual litigant may benefit, the wider benefits of a positive decision are denied to the group of persons affected.

A further issue suggested by experience in the UK – although rarely raised by Irish respondents – is the possibility of an NGO having locus standi to bring a case in an area in which it is concerned. This would avoid having to search for an individual litigant who might be reluctant to bring a case for a variety of reasons. An example might be whether the Free Legal Advice Centres would be entitled to bring a case in relation to delays in access to civil legal aid. The High Court has recently held that the Irish Penal Reform Trust has locus standi to bring proceedings in a case involving the rights of prisoners with mental illness who were unable adequately to vindicate their rights.

Implementation and Enforcement of decisions

Enforcement of decisions is important from the point of view of public interest litigation. Insofar as the objective of such litigation is to improve the position of disadvantaged and vulnerable groups, the key issue is not whether individual litigation is successful but whether on balance the position of such groups has been improved as a result. It was clear from respondents that public bodies involved in litigation did change policies (and in some cases legislation) as a result of litigation. In some cases, this led to improvements from the point of view of the group involved but in others the law or administrative practice was simply brought into line with the original intention of the public body. Private solicitors, because of the nature of their work, tended to be more concerned with the outcome of individual cases and less concerned with the broader policy context. Law centres were able to be more concerned with the overall policy context and experience in the UK has shown that legal NGOs have the potential to follow issues over time to the benefit of specific groups.

How to overcome the barriers

Costs

i) Lawyers' costs – The fundamental issue in relation to the legal costs involved in bringing public interest litigation is the absence of a comprehensive scheme of civil legal aid. The Irish legal aid scheme is, in practice, largely confined to family law cases. In contrast, much public interest litigation in the UK is funded through legal aid. Cases which might otherwise be excluded from the scope of legal aid may be funded where they raise an important issue of public interest. In addition, many legal NGOs are funded on a contract basis to provide specialist legal aid and advice.

It seems highly likely that the different availability of legal aid in the UK and Ireland has contributed significantly to the different levels of development of public interest litigation in the respective countries. One option would be for government to improve the Irish legal aid scheme so as to allow adequate funding for public interest litigation. However, in a situation where access to legal aid for even family law cases remains subject to waiting lists, it seems unlikely that government would see the funding of public interest litigation as a priority. Accordingly, we look at a number of alternative approaches.

One option is the establishment of a Public Interest Litigation Fund to resource public interest litigation. The basic idea is that a private body (or bodies) might invest resources in a fund which would be used to support public interest litigation.

ii) Client costs - There are a number of options in relation to reducing or controlling the client's exposure to costs. One is the increased use of non-court fora such as, for example, Ombudsman schemes where costs are not awarded.

A second issue is to re-examine the basis upon which the courts award costs against a public interest litigant. This issue has received some consideration in a number of recent High Court

decisions. In a recent decision, the High Court held that the exercise of the court's discretion to depart from the normal rule that costs follow the event is governed by two principles:

1) that the plaintiff was acting in the public interest in a matter which involved no private personal advantage; and
2) that the issues raised by the proceedings are of sufficient general public importance to warrant an order for costs being made in his or her favour.

However, the jurisprudence as to when costs will be awarded in public interest litigation remains unclear. It would be helpful if the approach which will be applied was clarified by the judiciary and, insofar as possible, standardised. The constitutional importance of access to the courts and the absence in practice of legal aid in many cases should be taken into account in such clarification.

In the United Kingdom and other jurisdictions, the device of 'protective costs orders' has been developed. This is a procedure by which a party to proceedings can apply to court in advance of the substantive hearing of a case for an order limiting the party's exposure to costs. The Irish High Court has held that it does have jurisdiction to grant such an order but it does not appear that such an order has been granted to date by the Irish courts. It would be helpful if the Irish courts clarified the principles upon which such an order would be granted in an Irish context having regard to the English approach and to the differences in terms of access to the courts in the two jurisdictions. However, it would appear necessary, if advance orders are to be made as to costs, that the courts should also clarify the overall basis upon which orders as to costs are to be made in public interest cases (as discussed above).

iii) Recovering costs – One way to address this issue would be for solicitors to make their clients aware, in advance, of their liability for costs irrespective of the outcome of the litigation. Such a practice would protect the solicitor's right to be paid fees by the other side but if the litigation was subsequently unsuccessful, the solicitor might decide not to enforce such a right. However, this is a somewhat artificial arrangement and it only adds to the difficulty of explaining already complex issues to a client (and requires a considerable degree of trust on the part of the client). The Civil Legal Aid Act [s. 33] addresses this issue in relation to persons covered by legal aid and it would appear desirable that similar clarification should be provided for by legislation in relation to non-legally aided persons who are being assisted by a law centre or on a *pro bono* basis.

iv) Costs of expert witnesses, etc. – Again in the absence of more comprehensive legal aid, one option would be to meet these costs through a Public Interest Litigation Fund.

Judicial attitudes

A number of respondents suggested that judicial training in relation to public interest issues - as part of judicial studies organised by the Judicial Studies Institute - would be helpful.

Procedural issues

The Law Reform Commission has recently published the results of its study on class actions. As the a rea of public interest law develops this could become an important issue in facilitating litigation.

The Supreme Court has recently clarified the law in relation to amicus curiae applications in Ireland. This remains an underdeveloped area in this jurisdiction. In the UK, it is much more common for NGOs to intervene in public interest cases. This allows them to raise public interest issues of importance to them at a much more limited cost (and generally without exposure to other parties' costs). The amicus procedure has important potential in an Irish context. However, the limited number of public interest cases going before the Irish courts mean that this potential is currently limited in practice.

The issue of moot cases is also one of more immediate importance. In the UK, the House of Lords has held that it has the discretion to hear an appeal concerning an issue involving a public

authority as to a question of public law where this was in the public interest even where the issue was strictly moot. A similar approach might usefully be adopted in this jurisdiction.

Enforcement of decisions
In relation to the enforcement of judgements, it has been suggested that public bodies should be under a legal obligation to review persons affected by the outcome of a judicial decision (where this is possible based on the files which they hold). In practice, such an approach has been adopted in a number of cases in Ireland, e.g. in relation to claims for 'equality' arrears under the social welfare code and the Ombudsman encourages public bodies to adopt a similar approach to ensure the full enforcement of her decisions.

Development strategy

Overall approach
When reference is made to PILL, many people immediately focus on the litigation aspect. However, the experience in this country and in neighbouring jurisdictions indicates that a public interest litigation strategy works best when it is part of a broader public interest law approach involving issues such as law reform and legal education. It is suggested that a development strategy to advance public interest law and litigation should adopt a comprehensive approach to PILL and should provide an integrated range of supports to measures in different areas.

Law Reform
The key issue identified in this area is the need for NGOs representing disadvantaged and vulnerable groups to be able to identify legal issues and prepare detailed law reform proposals. The *Voluntary Assistance* scheme introduced by the Bar Council provides the opportunity to avail of legal expertise. However, it seems unlikely that this opportunity will be fully taken up unless specific steps are taken to bridge the gap between the groups who need advice and assistance and the barristers who can provide this.

One option is that a legal policy officer be appointed whose role might include:

i) meeting groups with law reform issues to help them to address the precise nature of the issue and possible approaches; and

ii) putting them in contact with a barrister under the Bar Council scheme.

There is currently a lack of specific funding to support law reform and this could be addressed if a legal research fund was established to facilitate NGOs in carrying out legal research.

Legal education
The development of a strategy in this area might include the following measures.

1) Law schools should examine the extent to which their intake of students includes persons from disadvantaged and vulnerable backgrounds and should work closely with access programmes to increase the proportion of law students from disadvantaged backgrounds. This should include working with specific local secondary schools to improve the legal education of young people from disadvantaged areas / groups and encourage interest in the law.

2) Professional law schools should similarly examine the extent to which students from disadvantaged backgrounds are represented on their courses and should examine what needs to be done (including the operation of existing scholarship schemes) to increase uptake.

3) Law schools should examine the concept of clinical legal education and consider whether it (or some aspect of variation of this approach) would be appropriate to them. This may require additional financial support to allow the employment of a person to co-ordinate such courses.

4) A Centre for Public Interest Law should be established in a university with the remit of carrying out research on public interest law issues, particularly in a comparative legal context; providing advice and support to independent law centres (and possibly to others involved in the area) on PILL; further developing links with community groups to support the provision of community legal education; and teaching public interest law to law students.

Community Legal Education

In the area of community legal education, there is currently very little happening. There is a need to resource innovative approaches to see what works and how policy in this area might be developed.

One option is that a fund be established to resource innovative and important initiatives in the area of community legal education (similar to the LEAP and Participation and Practice of Rights initiatives). This fund would provide support to innovative projects over a five year period (on a once-off or ongoing basis).

The operation of such a fund should be discussed with key players including the Legal Aid Board, Comhairle and the Department of Social and Family Affairs. Measures funded should be evaluated.

Litigation

Overall, the capacity to pursue a public interest litigation strategy is somewhat limited. It is recommended that development in this area should aim to expand capacity in a measured way over the medium term (i.e. say five years) rather than aiming for a dramatic increase over a short period.

Costs

The fundamental issue in relation to costs is the lack of a comprehensive scheme of civil legal aid. The following options can only go part of the way to addressing the costs issues in the absence of such a scheme.

Options include

1) A Public Interest Litigation Fund be established to help to meet the costs of certain public interest cases and to help to develop a greater body of litigation. Public interest litigation should seek to clarify the legal position on costs including that concerning protective costs orders. The judiciary should be open to an interpretation which will support public interest litigation having regard to the constitutional importance of access to the courts and the limitations of the existing legal aid scheme.

2) The law concerning recovery of costs should be amended to ensure that costs can be recovered in pro bono and law centre cases.

Procedures

Public interest litigation should seek to clarify the legal position on procedural issues including the locus standi of NGOs and the possibility to adjudicate on important moot points.

Referral lists

A number of NGOs already have formal or informal lists of solicitors interested in a particular area of public interest law to whom they refer persons with legal issues. It is recommended that more NGOs should develop and keep up to date such referral lists.

Next steps

Further development of an appropriate strategy to advance the required infrastructure and resources depends significantly on the extent to which private funders, foundations, the legal profession and statutory agencies are prepared to commit resources to this area and the extent to which they are prepared to play a key role in developing the strategy. The future development of public interest law and litigation in Ireland can only succeed though the co-operation of a number of key interest groups. It is the objective of this research to act as a starting point for discussion and debate leading to such co-operation amongst the key organisations.

Using the Law to Change the World

Julian Burnside QC, Melbourne, Australia

> The trouble with fighting for human freedom is that one spends most of one's time defending scoundrels. For it is against scoundrels that oppressive laws are first aimed, and oppression must be stopped at the beginning if it is to be stopped at all.
>
> H.L. Mencken

Minorities and the rule of law

The establishment of the rule of law was the great product of the constitutional struggles in England during the 17th century. The rule of law requires that all people, including the government, are subject to the law, and that independent judges are the arbiters of law.

Majoritarian rule is the central tenet of democracy. Parliament makes laws which reflect the will of the majority. In principle, the combination of democracy and the rule of law should achieve justice for all. In practice, it is different.

The difference is largely felt by individuals or groups who are powerless or unpopular. Injustices generally stem from one of two sources: first, bad laws which operate harshly against minorities, but have the support of the majority who vote and whose interests are not harmed by those laws; secondly it is often the case that powerless minorities do not have the practical ability to vindicate the rights given them by law. Access to justice requires access to lawyers as Lord Darling noted ironically "like the doors of the Ritz hotel, the courts are open to rich and poor alike".

To redress injustices of either sort, it is essential that the legal aid system be properly funded and essential that litigation in the public interest should be facilitated, not stifled. In theory, our system offers several ways of redressing injustices. The local MP and the local press are traditional ways to pressure governments to redress injustices. In practice this, too, is different.

The emergence of the two-party system of government has reduced the relevance and influence of individual parliamentarians almost to vanishing point. Government decision-making, in my country at least, shows an acute concern for the interests of the majority and very little concern for the interests of unpopular or powerless minorities. And the press, which is capable of drawing attention to abuses of power, occasionally falls asleep at the wheel. It has been notoriously indifferent to some important issues in my country in recent years.

In this bleak setting, public interest litigation is one of the few ways of achieving justice for the weak. It is no accident that litigation *pro bono publico* – for the good of the public– is synonymous with litigation undertaken for no fee: the rich do not need it. The strong never have difficulty achieving justice: like a Bill of Rights, public interest litigation is generally concerned with the rights of the weak, the oppressed, and the unpopular.

Fighting for minorities

My first encounter with litigation of this sort, litigation the significance of which transcends the interests of the immediate parties, was the action brought by natives of the Ok Tedi River in Papua New Guinea against mining giant BHP. BHP had established a copper mine in the New Guinea highlands. The tailings dam failed and it was going to be expensive to rebuild it. BHP persuaded the government to allow it to dump the tailings into the river. As a result, millions of tonnes of polluted tailings were poured into the river from which, for generations, the

natives had derived their sustenance. The river was polluted beyond recognition and the natives' traditional way of life was destroyed. The government's response was to offer resettlement. A suit was brought in the Supreme Court of Victoria, a building modelled on the Four Courts in Dublin, and just two blocks away from BHP's headquarters. When BHP began to recognise that it had some problems in the litigation, an astonishing thing happened. The government of PNG passed an Act which made it a criminal offence to sue BHP for polluting the Ok Tedi River or to continue any such action already on foot; it also made it a criminal offence to assist a person to bring or maintain such an action.

Things looked grim. Plainly, it was not possible to do anything to overturn the legislation; and it appeared to be impossible to continue the litigation since we lawyers, and our clients, would thereby be committing an offence. But we discovered that BHP's lawyers had drafted the legislation: a draft with their word-processing footer was found. We charged BHP with contempt of court: they had knowingly taken steps to impede our clients' access to the Court in existing litigation. The judge agreed with us, and found BHP guilty of contempt just at the time their annual general meeting was to be held. Their share price fell significantly, wiping millions of dollars off their market capitalisation. Their bad behaviour dominated the AGM. Within a fortnight they came to the negotiating table and resolved the litigation.

Trouble on the waterfront

On 8 April 1998, Australians awoke to the news that the waterfront had been taken over by security guards wearing balaclavas. The entire workforce of Patrick Stevedores had been removed, apparently because they belonged to the Maritime Union of Australia. Their removal had been achieved by use of attack dogs, chain-mesh fences and grim-looking men more likely chosen for their size than their personality. It quickly emerged that the whole exercise had been planned by Patrick Stevedores with the active connivance of the Howard government, and in breach of John Howard's own Workplace Relations Act. We went into the Federal Court on the morning of 8 April to begin what looked like a hopeless task, opposed by the government and Patrick Stevedores with its multi-million dollar war-chest. We won the first round, and Patricks appealed the same day; the appeal was heard the following day. We won the appeal, and Patricks lodged an appeal to the High Court the same day. Four days later a full bench of the High Court heard the appeal. Their judgment, less than a month after the case began, vindicated the position of the Union, and the union members were allowed back onto the docks. On that case hung the viability of the union movement in Australia because, as one commentator observed, if they could take out the MUA, they could take out anyone.

One of the finest rewards I have received in the public interest cases I have been involved in came as I left the High Court building after we got judgment on 4 May 1998. A man dressed in working clothes came up to me and said "Thanks mate – we all feel a bit safer". It was a precious moment.

Saving Rozita

But not as precious as another which came a few years later, in a phone call from a woman I will call Rozita. Rozita had arrived in Australia from Iran in mid-1999. She was detained, and while detained she converted to Christianity. She was baptised in August 2000, after the Department of Immigration lifted its ban on baptism in detention. She began preaching against Islam. In late August, Hussein, an Iranian man held in the same detention camp, left Australia voluntarily and returned to Iran. Hussein informed on Rozita. Her family in Iran contacted her to tell her she was in great danger if she returned to Iran. Preaching against Islam is a serious offence in Iran. If she returned she faced the prospect of being stoned to death.

I have seen an official video tape of two women being stoned to death. They are brought out wrapped from head to foot in a winding cloth. They are placed in holes about 3 feet deep. The dirt is shovelled in around them, so that their bodies are buried to waist level. They are then bombarded with medium-sized stones from all sides. They cannot flinch in anticipation,

because they cannot see. They flinch after each blow. Gradually blood begins to seep through the shroud; their bodies start to sag forward. Eventually they collapse completely, and their bloodied skulls are clearly visible through the torn material. They are dragged out of the holes and are carried away.

A central fact in Rozita's claim for asylum was that Hussein had returned to Iran and informed on her. Five witnesses gave evidence that Hussein had been in the camp at the relevant time, and that he had taken some of Rozita's writings with him when he returned to Iran. No witness contradicted that evidence. Rozita told the Refugee Review tribunal (RRT) Hussein's camp number and his boat number. She asked the RRT to check on Hussein to dispel any doubt about this part of her claim.

The RRT found, as a fact, that Hussein did not exist. The tribunal member found, as a fact, that Hussein's existence had been fabricated by Rozita and her witnesses in order to fortify her claim for asylum.

When the case came to be reviewed in Court, a subpoena to the Department produced documents which showed not only that Hussein existed, but that he had been in the camp exactly when Rozita said he had, and that he left for Iran exactly when she said he had.

The tribunal member had not even bothered to ask the Department whether it had a record of Hussein. That casual indifference would very likely have led to Rozita's death. When the decision came on for review in court, the Government argued that the decision should not be overturned. It appeared not to trouble the RRT or the Government that, if Rozita were returned to Iran, she would almost certainly be stoned to death.

The court overturned the decision on the grounds that failure to make a simple enquiry on a question, literally, of life and death was evidence of bad faith. This meant that Rozita's case was sent back to the Tribunal to be reheard. Several months later, I received a phone call from Rozita: she had just received a decision from the Tribunal. Her claim for asylum was accepted, and she was to be released from detention and given a protection visa. She had been in detention 3 years.

I met Rozita for the first time some months later. My wife and I took her to dinner. Her one wish is to be able to return to Iran to live – she just does not want to return there to die.

Since the abolition of capital punishment, it is a rare claim for a lawyer to save a client's life. But in refugee work it remains possible, and it is a grand thing to do.

Oppression of the unpopular

Public interest litigation in Australia has been dominated by refugee law in recent years. This is a direct result of the extraordinary harshness of our laws, and the utter and obvious powerlessness of asylum seekers. Asylum seekers who arrive in Australia without prior permission are immediately detained. By force of the Migration Act they must remain in detention until they are given a visa or are removed from Australia.

The government, and the media, refer to them as "illegals", however the fact is that to come to Australia without authority and seek asylum is not an offence against Australian law. To the contrary, Article 14 of the Universal Declaration of Human Rights guarantees to every human being the right to seek asylum in any territory they can reach. Those who come to Australia trying to exercise that right are locked up in desert camps or, since October 2001, in remote desert islands.

Australia's system of indefinite mandatory detention has been universally criticised by humanitarian organisations both in Australia and overseas. Australia's scheme of mandatory

detention of asylum seekers has been criticised by a UN Working Group as constituting arbitrary detention, in violation of Article 9 of the International Covenant on Civil and Political Rights.[1]

Mandatory detention has been promoted by the Australian government as 'border protection'. This has proved very popular in the electorate. For two centuries Australians have lived in dread that we will be swamped by uninvited visitors arriving in small boats.

It is useful to put this in context, given the rhetoric that surrounds it. Every year 4.7 million people visit Australia, short term visits for holidays or business. Every year 110,000 people migrate permanently to live in this country. Every year – until the time of Tampa at least – there were on average 1000 people who arrived without authority and sought asylum; of them, approximately 90% were found to have proper grounds for refugee status. The highest number of unauthorised arrivals in one year [2] was just over 4100: most of them fleeing the Taliban or Saddam Hussein.

Lock them up forever

In November 2003 two cases were heard together by the High Court of Australia[3]. Together they tested key aspects of the system of mandatory detention. First, the case of Mr Al-Kateb, a stateless Palestinian, a person who has no country he can go to. He arrived in Australia a few years ago, sought asylum, was refused refugee status and then remained in detention. Why? Section 196 of the Migration Act says that an 'unlawful non-citizen' who is detained must remain in detention until (a) they are given a visa or (b) they are removed from Australia. It was not possible to remove him from Australia, because there is nowhere to remove him to. The government's argument was that, although Mr al Kateb has committed no offence, he can be kept in detention for the rest of his life. On 6 August 2004, the High Court by a majority of 4 to 3 accepted that argument.

The other case, heard alongside *al Kateb* and decided on the same day, was *Behrooz*. Mr Behrooz came from Iran, sought asylum and found himself in the endless loop of rejection and appeal and spent, I think, 14 months in Woomera detention centre before the circumstances there got so appalling that he couldn't bear it any more. He escaped in November 2001. In November 2001, Woomera was carrying three times as many people as it was designed to carry. The conditions there were abominable. Reports from that time suggest that there were three working toilets for the population of nearly 1500 people. That was the time when women having their period had to make a written application for sanitary napkins. And if they needed more than one packet they had to write and explain why they needed more than one packet and very often they had to go and provide the form to a male nurse who would then dispense what they needed. Conditions in Woomera at that time were unbelievably bad, utterly inhumane. The Immigration Detention Advisory Group, the government's own appointed body, described Woomera as "a human tragedy of unknowable proportions".

Mr Behrooz found it so intolerable that he escaped, along with some others. He was charged with escaping from immigration detention. The defence went like this: The Australian Constitution embodies the separation of powers. This means that the legislative power is vested in Parliament (Chapter I). The executive power is vested in the executive government (Chapter II) and the judicial power is vested in courts established under Chapter III of the Constitution.

The notion of the separation of powers involves this: that one arm of government cannot exercise the powers given to another arm of government. It is one of the very few constitutional safeguards we have in Australia. Central to the judicial power is the power to punish. As a matter of constitutional theory, punishment cannot be administered directly by the parliament or by the executive, punishment can only be imposed by order of the Chapter III courts. Normally, locking people up is regarded as punishment and therefore it is only Chapter III courts that can lock people up. What about immigration detention?

In *Lim's* case in 1992, the High Court held that administrative detention may be justified in limited circumstances, principally where it is reasonably necessary to the performance of a legitimate executive function. So if a person's asylum claim is to be processed, or if the person is to be made available for removal from Australia, then as long as the detention is reasonably necessary for those purposes it will be lawful even though not imposed by a Chapter III court.

Well, the defence in *Behrooz* went like this. Assuming mandatory detention is constitutionally valid, if the conditions go beyond anything that could be seen as reasonably necessary to the executive objectives then that form of detention will be constitutionally invalid because it simply amounts to punishment inflicted by the executive.

We issued subpoenas, directed to the Department and ACM,[4] seeking documents that reveal details of conditions in detention. They resisted. They said the subpoena was invalid because the conditions in detention will never affect the constitutional validity of detention. And all the way to the High Court they maintained this argument that no matter how inhumane the conditions are, detention in those conditions is nevertheless constitutionally valid. On 6 August 2004, the High Court accepted the government's argument.

Sadly, the press paid almost no attention to the decisions in those cases, with all their grim implications for human rights in Australia.

What do you do, when faced with a government that is willing to countenance and advocate such gross human rights abuses as we are seeing in Australia at the moment under the Howard government? Unfortunately the options are limited, and the limit comes from the fact that the media have been mysteriously silent on most of these excesses.

Billing them for the privilege

A few years ago I discovered the startling fact that when a detainee is released, they are given a bill for the cost of their own detention.

Section 209 of the Migration Act provides that a person held in immigration detention is liable for the costs of their detention. It is a remarkable thing, at the best of times, that an innocent person who is incarcerated is made liable for the financial cost of their own incarceration. A bit of research reveals that no other country in the world makes innocent people liable for the cost of their own detention. Looking back through history reveals only two examples which Australia could look to as precedents. The first is the Law of Suspects, passed on 17 September 1793 whilst post-revolutionary France was ruled by Robespierre, during the period generally known as the Terror. The Law of Suspects empowered the local Committees of Security to detain people suspected of harbouring anti-revolutionary thoughts. Those people, whilst detained, were liable for the costs of their own detention.

More recently, the phenomenon is exemplified by a document held in the Ploetzensee Museum. It is a bill dated May 1944, addressed to the family of a man and charging the family with the daily costs of his detention in a concentration camp, the cost of gassing him to death and the cost of the postage stamp.

In Australia, the detention charge has GST[5] added.

It brings to mind the Chinese practice of sending the family of the executed criminal a bill for the bullet. Win lose or draw they are liable to the Commonwealth for the cost of their own detention. At Baxter detention centre, in the South Australian desert, it cost each inmate $350 per day, until recently. This is quite a lot to pay for being locked up against your will – for being brutalised and dehumanised routinely.

I have in my Chambers one example of this in which the man is informed of the conditions of his release: he must not study, he must not work and he must make immediate arrangements to pay the sum of $214,000 for his stay in Port Hedland and Woomera detention centres.

I told journalist after journalist about this. I could not get a single journalist to write anything at all about this fact, horrifying though it is. Perhaps they were not prepared to believe it, even when shown them the section of the Act and copies of the bills. When we set up a test case to challenge the validity of the provision on constitutional grounds, the press were much more enthusiastic. They ran articles comparing conditions in detention with conditions in a hotel at equivalent rates.

The last man on Manus Island

Something similar happened a while later with the last detainee on Manus Island detention centre. To understand this, you need to appreciate that, in the wake of the Tampa, Australia implemented its notorious Pacific Solution. This involves intercepting would-be asylum seekers at sea and taking them to Manus Island (part of New Guinea) or to the Republic of Nauru. There they are held, sometimes for years, while Australia seeks another country to take them. To be eligible for this special torment, the asylum seeker must not have set foot in the Australian migration zone.

(The migration zone is simply a construct for the purpose of the Migration Act. The islands offshore, 3000 or so that have been excised, are all still part of Australia's territory. But they do not form part of the 'migration zone'. The importance of that is that if an officer of the department finds a person, a non-citizen, in the migration zone, or seeking to enter the migration zone, then the officer has an obligation under law to take that person into detention. That of course means that they are in detention in Australia where they can make application for a protection visa. The trick about excising the islands to the North and West from the migration zone is that even if you reach Australian territory you are not required to be taken into immigration detention. Rather, you will be taken, against your will, either to Manus Island or to Nauru, where you are then held for months or years at Australia's expense.)

Aladdin Sisalem was born a stateless Palestinian, to an Egyptian mother and a Palestinian father. He was born in Kuwait. Kuwait will not allow them to live there. Palestine will not allow him to live in Gaza or the West Bank because he was not born there. Egypt will not allow him to live there. Since 1990 his family have been seeking permission to live in any country in the world that they can get to, and no country will have them because they have no country of their own. Aladdin made his way to Jakarta where for the next 12 months he waited while his application for asylum was considered and then rejected. He went to Papua New Guinea where he applied for asylum and for his troubles was arrested, imprisoned and beaten up. He bribed a fisherman to give him a ride across to Saibai Island which is part of Australia and not then excised from the migration zone.

On Saibai Island he surrendered to Australian Federal Police. He was unquestionably in Australian territory and in the migration zone. He told them his story and he told them he had come to Australia to seek asylum. They then took him to be interviewed by the Department of Immigration. He said why he'd come, and that he wanted to seek asylum. They then took him to Thursday Island, another part of unexcised Australia, where he was again interviewed. He said he wanted to seek asylum. He was then part of a telephone hook-up with a Department in Canberra. He told them he wanted to seek asylum in Australia. They then took him to a small aircraft and said "Your claim to asylum will be processed elsewhere".

They then took him to Manus Island where he was locked up in the detention centre, created under an agreement between Australia and Papua New Guinea, run by IOM, paid for by Australian taxpayers. He was told he has no asylum claim in Australia; that he had to deal with the Papua New Guinea authorities.

After some months, all the other detainees on Manus Island were taken to Nauru, but not Aladdin. He remained there, a solitary prisoner in a jungle island on the equator. When we learned of this we brought an action for mandamus: seeking an order that he be brought into

Australia and be processed according to law. The government's answer was this: "It is true that he entered the migration zone, so he cannot be taken to Nauru, and protected from the Papua New Guinea authorities who previously beat him up and gaoled him. He has not got an asylum claim in Australia because the only way you can seek asylum is by filling out form 866, and although he said he wanted to seek asylum, he didn't ask for form 866; only if he fills out form 866 does he have a valid application for a protection visa. Therefore the Minister does not have any obligation to consider his claim for a protection visa. And there is no point giving him form 866 now, because they can only be completed in Australia."

By this Kafkaesque logic, Aladdin was trapped in the mindless, heartless machinery of malevolent government.

Aladdin Sisalem had been alone on Manus Island since July 2003. It was costing the Australian taxpayer about $23,000 per day to keep him in his solitary torment. The tabloid press got onto this. They published front page articles showing the luxury you can enjoy for $23,000 per day in a hotel in Melbourne or Sydney. They were not driven by compassion, but by the politics of envy. It worked all the same. Quickly the government's treatment of Aladdin made a laughing stock of the Immigration Department. They approached us with a view to a quiet settlement. Aladdin now lives in Melbourne, and is slowly getting his life together again.

Two cases

Speaking for the rights of minorities can make you unpopular. There are two cases I have taken which I will remember to the grave and which, if I ever considered giving up, would have persuaded me to keep going despite consequences.

The first concerns a family who had arrived in Australia from Iran in early 2001. They were members of a religious minority who have been traditionally oppressed, a group regarded as 'unclean' by the religious majority.

The family fled Iran and ended up in Woomera, a desert detention camp. There, over the next 14 months, the condition of the family deteriorated inexorably.

Mother and father, eleven-year-old daughter, seven-year-old daughter were gradually getting worse and worse until the Child and Adolescent Mental Health Service of South Australia became aware of the problem. They sent a psychologist to speak to the family. He wrote a disturbing report in which, amongst other things, they say of the eleven year old:

> She refuses to engage in self-care activities such as brushing her teeth. She has problems with sleeping; tosses and turns at night; grinds her teeth; suffers from nightmares. She has been scratching herself constantly. She doesn't eat her breakfast and other meals and throws her food in the bin. She is preoccupied constantly with death, saying 'do not bury me here in the camp. Bury me back in Iran with grandmother and grandfather'.
>
> She carried a cloth doll, the face of which she had coloured in blue pencil. When asked in the interview if she'd like to draw a picture, she drew a picture of a bird in a cage with tears falling and a padlock on the door. She said she was the bird.

After a number of pages to similar effect, the report observed:

> It is my professional opinion that to delay action on this matter will only result in further harm to this child and her family. The trauma and personal suffering already endured by them has been beyond the capacity of any human being.

The report urged that the family be transferred from the desert camp to a metropolitan camp where at least they would get proper clinical attention which the eleven-year-old desperately needed. No action was taken, and a month later the psychologist wrote another report trenchantly criticising ACM and DIMIA for keeping the family in the desert instead of somewhere where they could get something like appropriate help.

Eventually they relented and the family was brought across to Maribyrnong detention centre in suburban Melbourne. However, on a Sunday night at about 8.00 pm, when the mother, father and sister were out of the room having their dinner, the eleven-year-old hanged herself. She did not die, and when they found her and had taken her down, she swallowed shampoo, and that didn't kill her. So she and her mother were taken to the emergency ward of the local hospital where she was put into intensive care straight away. The lawyer who had been looking after their refugee application heard about this and went to the hospital at about 8.30 pm or 9.00 pm on a Sunday. He went to the ACM guard who was there – guarding them in the intensive care unit for God's sake, as if they were about to make a run for it. The lawyer didn't need to introduce himself because he is well known at the Detention Centre. He asked to see them and was told: "No you may not, because lawyers' visiting hours are nine to five".

After a long struggle in court, and after the 11 year old had spent a year in a psychiatric ward, the family was released on protection visas. I will never forgive my country for its treatment of that family and that child.

The second case also concerns asylum seekers from Iran. Amin arrived in Australia in March 2001 with his daughter Massoumeh. She was then 5 years old. They were held in Curtin, then in Baxter.

On the 14 July 2003, three ACM guards entered Amin's room and ordered him to strip. He refused, because, apart from it being deeply humiliating for a Muslim man to be naked in front of others, his 7-year-old daughter was in the room. When he refused to strip, the guards beat him up, handcuffed him, and took him to the 'Management Unit'.

The Management Unit is a series of solitary confinement cells.

Officially, solitary confinement is not used in Australia's detention system. Officially, recalcitrant detainees are placed in the Management Unit. The truth is that the Management Unit at Baxter is solitary confinement bordering on total sensory deprivation. I have viewed a video tape of one of the Management Unit cells. It shows a cell about 3½ metres square, with a mattress on the floor. There is no other furniture; the walls are bare. A doorway, with no door, leads into a tiny bathroom. The cell has no view outside; it is never dark. The occupant has nothing to read, no writing materials, no TV or radio; no company yet no privacy because a video camera observes and records everything, 24 hours a day. The detainee is kept in the cell 23½ hours a day. For half an hour a day he is allowed into a small exercise area where he can see the sky.

No court has found him guilty of any offence; no court has ordered that he be held this way. The government insists that no court has power to interfere in the manner of detention.

There he stayed from 14 July until 23 July: each 24 hours relieved only by a half-hour visit from his daughter, Massoumeh. But on 23 July she did not come. It was explained to him that the manager of the centre had taken her shopping in Port Augusta.

The next day, 24 July, she did not arrive for her visit: the manager came and explained that Massoumeh was back in Tehran. She had been removed from Australia under cover of a lie, without giving Amin the chance to say goodbye to her.

Amin remained in detention for another 8 weeks. It took three applications in court to get him released from solitary. The government did not contradict the facts, or try to explain why they had removed the child from the country: they argued simply that the court had no power to dictate how a person would be treated in immigration detention.

The judge found otherwise and ordered that Amin be removed from solitary confinement and be moved to a different detention centre.

The government appealed. That appeal failed. Eventually, after Amin had spent another two years in detention, he was given a protection visa.

If ever my resolve weakens, I will have in my mind's eye the sight of an 11-year old girl hanging herself, and the sight of a man grieving for the daughter stolen from him as he tried to find protection for her in Australia.

This is Australia's system of mandatory detention. It offends every decent instinct – and for what? To deter people smugglers. The Human Rights Commission report on Children in Detention concluded that the treatment of children in Australia's detention centres was "cruel, inhumane and degrading", and that it constituted systematic child abuse. The Minister did not seek to deny the facts or the findings: instead, she said simply that it was "necessary", that the alternative would "send a green light to people smugglers".

Many test cases have been brought in Australia in an attempt to ameliorate the harshness of the mandatory detention laws. Most of those cases have failed. But public sentiments have shifted as case after case has exposed to public view the worst of what my country has been doing. The shift in public sentiment has provoked a shift in the way the policy is implemented.

Changing the world?

Some people do not like to acknowledge that litigation is a legitimate instrument of social policy. But if the law offers a right which can be invoked in novel ways to redress injustice, then surely this is exactly what litigation is designed to do. And if an injustice is embedded in the fabric of the laws society has made, litigation may be the only way to redress those injustices.

Arundhati Roy, the famous Indian writer, best known outside India as the author of *The God of Small Things*, once wrote that "A thing once seen cannot be unseen, and when you have seen a great moral wrong, to remain silent is as much a political act as to speak against it."

It is a true and sustaining idea. Most people in this room will understand it immediately. The practice of law offers many rewards: at best, each of us as practitioners can play an important role in achieving real justice in society. Every case is important to someone and we serve the law by making sure that it is properly administered in every case. This is why properly funded legal aid is so profoundly important: to speak of access to justice while leaving it beyond the reach of those who most need it is sheer hypocrisy. To make justice available to all will help change the world.

And then there are times when the law itself betrays justice, when injustice is built into the structure of the law. We face a stark choice: we can lend our arm to enforcing bad laws, or we can try to change them. It is one of the few truly great things about the practice of law that we have the skills to understand the law and the ability to challenge it. We have the training to administer justice and the ability to seek it. Public interest litigation has a vital role to play in exposing and redressing structural injustices.

As lawyers we can help the weak and unpopular find justice, by making sure beneficial laws are invoked in their interests and by challenging the moral authority of bad laws. If justice is a lawyer's vocation, then we must not ignore its call when justice itself is threatened. But this challenge will only present itself in the cause of the unpopular and powerless. That is the nature of things.

Litigation in the public interest will not make you rich and might not make you popular, but it will be the most satisfying and valuable work you ever do. If you run a case which leaves society better and more just, you will have a reward beyond riches and you will have change the world.

1 For extracts from the report of UN Working Group on Arbitrary Detention see Appendix 2.

2 In 1999-2000.

3 The ultimate appellate court in Australia; equivalent to the Supreme Court of Ireland.

4 The commercial operator which at that time ran the detention centres. Its contract has since been taken over by GSL.

5 GST stands for Goods and Services Tax, which is levied on most goods and services in Australia.

Morning Questions and Answers Session

The Hon Mrs Justice Catherine McGuinness

We have been both moved and inspired by that wonderful contribution by Julian Burnside, one that is particularly apt for us, in that there is a very high level of litigation regarding refugees and asylum seekers in this jurisdiction at present. With respect to some of the remarks he has made about the methods whereby their fate is decided, it is important that commentary has shown here that there is no reporting of the decisions of the appeals tribunals. That is a very distinct lack in the legal system. So we do not have detention centres of that sort, we do have certain politicians that have commented that they would be a good idea, and this contribution may assure us that they are not in the public interest.

Q Orlagh O'Farrell

In Australia are there no overriding international law and norms that can be used to influence the Australian legal system? In Ireland I think quite good use has been made of the European Court of Justice and the Convention on Human Rights, so is there international law that you can use as a help in your campaigns?

A Julian Burnside QC

The short answer is no, although we are a signatory to all the major human rights instruments, but by signing the instruments we do not incorporate them into our law. The furthest we have gone is that in circumstances where legislation is ambiguous it is preferable to resolve the ambiguity in a way that conforms to our convention obligations rather than contradict it. But even that modest concession has been whittled down at the moment by our High Court, which if I may say with respect, is increasingly comprised of conservatives and black letter lawyers who take a very stringent approach to statutory interpretation.

A single example might suffice: a man who was on the point of being removed from Australia, who they had planned to send to Iran from where he had fled. We brought a case which said, you can remove him from Australia, that is fine, but do not send him to Iran because he will be tortured or killed. They demurred to that and so the matter went up through the court system on the assumed fact that he would be tortured and at every stage of the court process, the court said; "that is ok, you can send him back". And on the special leave application, the Chief Justice said to me, the problem for you is that the power to remove is not ambiguous. I replied, saying that if it is not ambiguous, it means they can remove him by taking him beyond the territorial limits and dropping him in the ocean and the other judge said, well, if that is what they want to do, so be it! This struck me as quite difficult to accept.

It is a narrow approach to interpretation we have got, we do not have a bill of rights, there are no rights entrenched in the constitution, apart from the limited protection you get from the separation of powers and we are flagrantly in breach of our international convention obligations. This is depressing but it also keeps you going. There is no point tackling small hurdles.

Q David Wheelahan

Could you tell us something about the public interest law clearing house in Victoria and the way the government in Victoria encourages firms to do *pro bono* work by the awarding of government legal work?

A Julian Burnside QC

The public interest law clearing house in Victoria's whole function is to choose and run public interest law questions that will act as a clearing house. The way they operate is by farming out appropriate cases to the private profession. In conjunction with that, as you pointed out, the state government of Victoria has made one of the conditions of receiving state government work that legal firms do *pro bono* work and legal aid work, so they are actively involved in encouraging the provision of free legal services including in the realm of public interest litigation.

I do not know if there is anyone here from treasury, can I suggest a modest way of encouraging an increased *pro bono* effort from the private profession, and it is this; you allow people to do legal aid work, allow them to keep a record of their time in accordance with their ordinary billing practice and instead of paying their bill you give them a tax deduction to the same extent.

The point of this is of course that the big end of town that have the most to save in tax will be immediately attracted to do *pro bono* work. At the moment the burden is largely carried by the other end of town and it is all to their credit that they are prepared to do it. But encouraging the big end of town is a good idea and a tax deduction structured that way is probably the most effective short-cut to encouraging the big end of town to shoulder more of the burden. And frankly, I do not think the fiscal effects of it would be that great, because at least in Australia you would get them doing *pro bono* work to get their tax deductions instead of going into artificial tax schemes to get their tax deductions. We achieve a net benefit to society and thus we change the world!

The UK experience of test cases and the Human Rights Act 1998

Roger Smith, Director, JUSTICE

This paper covers four issues:

1. The context of test case litigation in England and Wales;
2. The effect on test case litigation of the Human Rights Act 1998 (which came into force on 2 October 2000).
3. The types of litigation that have been taken.
4. Possible lessons for Ireland.

1. The context

Test cases have a long history in England and Wales. Slavery was successfully challenged by cases taken as part of the anti-slavery movement[1] and two key Scottish test cases on the lawfulness of slavery in the British Isles were effectively third-party interventions, "memorials" that displayed "a copiousness and variety of curious learning, ingenious reasoning and acute argumentation".[2]

Overall, however, the UK's unwritten constitution has been taken as making it clear that Parliament was sovereign. As the nineteenth century constitutional apologist, Professor Dicey, put it:

> Parliament has, under the English constitution, the right to make any law whatever, and further, no person or body is recognised by the law of England as having the right to override or set aside the legislation of Parliament.[3]

My personal record was 48 hours: a potential landmark decision of the Social Security Commissioners was overturned by further secondary legislation within that period and before I had time to read the judgment. There has been no equivalent of the unilateral declaration by the United States Supreme Court that it was the ultimate authority.[4] As late as the early 1980s, a study of the Child Poverty Action Group's test case strategy concluded:

> The most important conclusion … is that not only are the indirect effects of test cases more important than the direct effects, but the role of the courts is overall marginal.[5]

A number of different trends emerged well before the Human Rights Act (HRA) was passed that changed the general relationship between the judiciary and the executive, challenging too complacent an acceptance of Dicey's proposition. To these, the HRA has added momentum. They will be relevant to the success or failure of any public interest litigation strategy in Ireland. They included:

- ***The development of judicial review***. As the 1970s and 1980s advanced, the courts adjusted to playing a more active role in the monitoring of government. This has been particularly so in relation to their insistence on fair procedures. It is, thus, no surprise that judges have been very willing to intervene to uphold the quality of decision-making, for example, regarding an adequate tribunal system for mental health cases. What is more, there has been a simmering debate about the constitutional limits of Parliament – to what extent can the courts be excluded or 'ousted' from their supervisory jurisdiction. This recently came to a head in relation to review of asylum cases. It led to a somewhat unresolved debate to which one senior retired judge testily contributed:

> Had they [the government] successfully pursued the ouster clause then we certainly would have been in a very interesting constitutional crisis. If they really did that … we would have to say "We [the judges] are an independent estate of the realm and it's not open to the legislature to put us out of business. And so we shall simply ignore the ouster clause".[6]

I would imagine that things are better regulated in Ireland where you do have a written constitution. I do not know, however, how much you have developed judicial review – with its concepts of rationality and illegality that have provided an increasingly solid platform for challenge of public authorities in England and Wales.

- ***The growth of importance of the European Union*** where the European Court of Justice can deliver interpretations binding on national government. This does provide an absolute source of authority on some areas of jurisdiction, for the UK as for Ireland. It provides hope of hitting the jackpot for public interest litigators. Camden Law Centre, for example, took major European employment litigation in relation to allegations of indirect discrimination against women in the procedures for unfair dismissal. Reference to the European Court of Justice – after the case had progressed through the Divisional Court and Court of Appeal – provided an ultimate source of authority.[7]
- ***A further internationalising influence has been the European Court of Human Rights*** where, even before the Human Rights Act, the UK government was accustomed – sometimes with reluctance – to compliance with its decisions. The Human Rights Act has increased the influence of the court, requiring that its decisions be "taken into account" by domestic judges.[8]
- ***The development of an approach to legal standing that was liberally inclined to NGOs*** representing the interests of their membership. This approach was pioneered by the Child Poverty Action Group (CPAG)[9] but has since been used by a number of the national organisations. These include the Joint Council for the Welfare of Immigrants,[10] Shelter, Liberty and MIND.
- ***The development of 'third party interventions'*** where a third party, often an NGO, may apply to be heard either in writing or orally. The widely used definition of 'public interest cases' as ones which "raise issues, beyond the personal interests of the parties in the matter …" is, in fact, taken from a Public Law Project study of the use of third party interventions which points out their further potential.[11]
- ***The existence of a cadre of national organisations*** proclaiming a 'test case strategy' and armed with lawyers to carry it forward. Many single issue campaigning groups in England and Wales have added a test case legal strategy as an adjunct to their political work. An obvious example would be Liberty which has always undertaken considerable casework. Russell Campbell, formerly at Shelter, which was a relatively late developer in the early 1990s of its legal arm, argued that there are three distinct strands to its test case strategy:

  > First, are cases in which it is decided that Shelter should be the applicant. For example, in 1996, Shelter challenged the retrospective effect of the Immigration and Asylum Appeals Act. The second component is the conventional one of dealing with a new point. The local [Shelter] Centres are in everyday contact with housing authorities and what is going on in their area. They are a good base from which key emerging issues can be identified. We have take cases involving priority in homelessness and home loss payments. The target is to try to get important cases to the Court of Appeal where they can set a precedent. The third strand is to use our authority and knowledge to join in on cases run by others. Shelter has developed the use of a witness statement as an alternative to third party intervention. This avoids some of the problems with third party interventions in relation to partiality, etc. It is also a way around any potential

> liability for costs. [In addition] one of the functions of a national team can be to accelerate developments of law and practice in a particular locality where there is, for some reason, a problem. As an example, we have been involved in some areas where there are local courts which do not have much experience of dealing with homelessness appeals. In that type of case, we have intervened to help local agencies effectively to educate the court and local practitioners. Once that has been done, we withdraw.[12]

CPAG have the most succinct justification for taking test cases – which, though specific to its work in social security, have a wider resonance. They argue that test cases can do the following:

a Deter unlawful administrative practice and lead to improvements in this area;
b Lead to improvement in standards of adjudication;
c Highlight the improved standards of adjudication;
d Generate publicity for CPAG and promote the aims of the organisation;
e Promote an interpretation of the law which maximises benefits to claimants;
f Even if we do not actually win the case, it can still highlight injustices and help build pressure to remedy these.[13]

CPAG has been pretty good about generating publicity for its cases over many years and originally built its strategy quite explicitly on a US model.[14]

- ***The availability of civil legal aid***. Although currently subject to cuts and re-branding as a Community Legal Service, the benefit formerly known as civil legal aid is still available for judicial review and challenges of the government. It provides both funding for representation and a degree of protection against an award of costs. Indeed, public interest litigation is privileged and a Lord Chancellor's direction authorises

> the [Legal Services] Commission to fund excluded services in Legal Representation in proceedings which have a significant wider public interest, other than proceedings arising out of the carrying on of the client's business.[15]

A special public interest advisory panel, largely composed of lawyers from non-governmental organisations (including JUSTICE), gives advice on appropriate cases.

2 Human Rights Act and litigation

Implementation of the Human Rights Act was delayed for two years while a major training operation was conducted for the judiciary, barristers and solicitors. Public authorities, from the police to regulatory bodies, reviewed their procedures with care to ensure compliance. It was anticipated that there would be an avalanche of litigation. In fact, the number of cases has been relatively low. However, the government expressly intended that some key issues in the Act would be decided in litigation. Thus, for example, the Act deliberately gives no definition of the 'public authorities' on which it places duties to be compliant with the European Convention on Human Rights. As a result, there has been a line of cases on this issue with, currently, a not entirely satisfactory result.[16] Some of these have been 'accidental' cases, i.e. raising a major point of public law only, in a sense, unexpectedly in litigation that set out on some other point. However, even in these, interested bodies such as JUSTICE have made third-party interventions to raise the public law issue.[17]

Slowly, the HRA is making its full influence felt. After a slow and uncertain start, the judiciary have now revealed themselves as willing to take up its challenge. At the core of the act are sections 3, 4 and 6. Section 3 requires that:

> So far as is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.

Section 4 allows the court to make a 'declaration of incompatibility' if it determines that a provision in primary legislation is incompatible with Convention rights.

A series of cases illustrate the extent of these provisions. In *Ghaidan v Godin-Mendoza*[18] the House of Lords indicated that section 3 created a "strong, rebuttable presumption" in favour of a compatible reading. This has famously involved some creativity. In an early case, by implication now recognised as setting the way, the House of Lords placed article 6 fair trial rights above the express words of a statute limiting admissible evidence in a trial for rape.[19] What is more, European jurisprudence on 'proportionality' has been seized upon to extend the grounds of judicial review beyond illegality and rationality.[20] As explained by Lord Steyn, discussion of proportionality takes the judge much further into the merits of the decision than was previously possible:

> First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test… is not necessarily appropriate to the protection of human rights… the intensity of the review… is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question of whether the interference was really proportionate to the legitimate aim being pursued.[21]

There have been spectacular decisions as judges have absorbed their new role. The Human Rights Act has been decided, for example, to apply to those in the prisons of the UK army out of the jurisdiction, in Iraq.[22] Celebratedly, the House of Lords ruled Part 4 of the Anti-Terrorism, Crime and Security Act 2001 to be incompatible.[23] This is a good time to be an English public interest lawyer and to have some source of funding.

There has been a political reaction against the breadth of this approach and, indeed, we may yet have serious political discussion of the merits of the Human Rights Act. The Prime Minister has announced that he would consider amending the Human Rights Act to require judges to accept agreements with third countries not to torture those returned to their custody.[24] This has set off a continuing row about how the doctrine of proportionality should be applied practically.[25] The former language of 'judicial deference' has been replaced by the concept of the "discretionary area of judgment" to be given to ministers.[26] A further dynamic has been given to the European Convention by its anti-discriminatory provision, Article 14. In particular, the European Court has been very clear that:

> Very weighty reasons would have to be put forward before the court could regard treatment based exclusively on the ground of nationality as compatible with the Convention.[27]

The House of Lords found the anti-terrorism provisions both disproportionate and discriminatory in its landmark judgment.

Thus, as its use has evolved, the Human Rights Act has provided a happy hunting ground for public interest lawyers. It has sparked a number of key issues, the balance of which are still being resolved. These include:

- Extra-territorial effect (Court of Appeal to hear appeal in October);
- The balance of sections 3 and 4 of the Act;
- Meaning of 'public authority';
- The general effect of national security considerations;
- The meaning and effect of proportionality;
- The relative powers of judges and ministers.

In addition, there is the indirect effect of the Act. How much do its provisions influence the common law even where they do not directly apply? In jargon, what is its 'indirect horizontal effect'? This is an absolutely fascinating area. Judges have indicated that:

> The time has come to recognise that the values enshrined in articles 8 and 10 are now part of the cause of action for breach of confidence.[28]

A judge, albeit in a minority Court of Appeal judgment, has also indicated that the prohibition against torture (Article 3) should be incorporated into the common law so that no court should allow evidence which might have been obtained by torture, even though the common law has previously been clear that all evidence may be submitted in civil cases and its provenance goes only to credibility.[29]

Thus, the Human Rights Act effectively changes the UK's famously unwritten constitution. It opens up the possibilities of test cases significantly beyond what they have been. In a way that was completely unanticipated, the Iraq war and the arrival of international terrorism within England and Wales has made the Human Rights Act particularly relevant to key political issues of the day.

3 The use of test cases on the Human Rights Act in the UK

From the point of view of public interest law, cases under the HRA may be divided into a number of key categories:

First, a small group of civil liberties lawyers, largely in private practice but often with an earlier history of working in the not-for-profit sector, have taken a series of key civil liberties cases. Thus, Louise Christian and Gareth Peirce have taken high profile challenges precipitated by the response of the government to the threat of terrorism, in particular the imprisonment of their clients without trial under anti-terrorism legislation. They have used the Human Rights Act to challenge provisions which would, otherwise, have been largely unchallengeable, at least in the domestic courts. In so doing, they have acted primarily under the stimulus of the interests of their individual clients. Among such lawyers, Phil Shiner of Public Interest Lawyers has been, in public interest law terms, the most interesting because he appears actively to have sought cases that might not, otherwise, have naturally come to him. For example, he was the solicitor behind the testing of the Act's extra-territorial effect in Iraq. He is also explicitly linking his firm with the concept of public interest law.

Second, some NGOs have deliberately taken campaigning cases based entirely on the new possibilities opened up by the Act. The best example of this is probably the challenge by Liberty to the law relating to assisted suicide – the Diane Pretty case. This was a Human Rights Act case and undoubtedly the one that has attracted most mainstream attention. It related to an application to the Attorney General for an assurance that Diane's husband, Brian, would not be prosecuted under the Suicide Act if he helped her to take her own life. Diane was suffering from motor neurone disease. The application against the Attorney General's refusal was dismissed by the High Court in October 2001; the House of Lords in November and the European Court in the next year. However, media coverage was massive – generating a major public debate on the subject of suicide.[30] The Diane Pretty case is probably the best example of the possible compensatory value in political terms of a case that may have lost in the courts – and, indeed, in this particular case was lost before every single judge who heard it.

Third, lawyers both in private practice and in NGOs, in planned campaigning cases and more routine litigation, have used the Human Rights Act to buttress arguments that they would have made otherwise on other grounds.

Vada Bondy of the Public Law Project reported that:

> About half of all judicial reviews raise a human rights issue. Undoubtedly, many litigators use it as a fall back argument to bolster a case [rather than a primary cause of action].[31]

In the early days of the HRA, Ms Bondy's research found widespread use of the HRA in a whole range of cases – though she suggests it is secondary:

> At permission stage, the Human Right Act issues were raised in 53% of immigration/asylum cases; 31% of housing cases; 46% of cases excluding immigration/asylum and housing; and in 49% of all civil claims.[32]

Many litigators reported that an early value of the Human Rights Act (HRA) was the stimulus that it gave, through training and reflection, to look at potential test cases of a kind that might have been justified in any event but which had added force after the coming into force of the Act. Thus, Child Poverty Action Group's experience of the HRA, as reported by legal officer Stewart Wright, was that:

> The Human Rights Act did not create a big bang in test cases. Nor did we think that it would. There were, however, a number of changes. First, we got a large number of rights' queries from advisers who had a vague idea that human rights might be relevant but no precise understanding. Second, we put in a lot of time training. Thirdly, its introduction did make us think through different types of challenge in which we might be involved.[33]

We may now be moving to a situation where the Act is established and we can say that it has a more direct influence.

4 Lessons for Ireland

The important issue for Ireland is whether any lessons can be drawn from a common law jurisdiction with so much shared history but with major differences. I am in no position to judge but the following may be relevant observations.

First, the value of legal aid is apparent, underlining the value of any way in which its effect could be duplicated, as in the creation of a litigation fund.

Second, the English courts had to move a long way over 20 years to ease the possibilities for public interest litigation – loosening rules on standing, cost indemnity, third-party interventions. I do not know how much of this groundwork remains to be done in Ireland.

Third, there has been a very real value in keeping litigation very close to organisations with wider political goals. In their practice, public interest law and public interest litigation need to be conceived as integrally linked to the substantive fields of law – social security, asylum etc – in which points arise.

Fourth, there is much that both lawyers in private practice and NGOs can do to change legal and political culture. I would hope that there could be helpful co-operation between those engaged in public interest law within both our countries.

Finally, as an extension of this, we have certainly benefited from an increasing engagement of private practitioners – both funded by legal aid and, particularly barristers, those acting on a *pro bono* basis – with NGO lawyers attracted by the intellectual challenge of this kind of work. This is a field that can attract – and should attract – the best legal minds who can work for progress from very different positions within the legal profession and the surrounding academic structure.

I wish you well.

1 See C Harlow & R Rawlings (1992) *Pressure through Law,* London: Routledge.

2 *Sheddan v Knowles* and *Knight v Wedderburn* (1772), quoted in *Somerset v Stewart* Kings Bench, http://medicolegal.tipod.com/somersetvstewart.htm

3 A C Dicey (1959) *Introduction to the Study of the Law of the Constitution,* London: Macmillan, p70.

4 *Marbury v Madison* (1803)

5 T Prosser (1982) *Test Cases for the Poor: legal techniques and the politics or social welfare*, London: CPAG.

6 *Guardian*, 26 April 2005, Lord Donaldson.

7 For at least part of the story see R Allen and G Moon, 'Strategic litigation in pursuit of pay +equity' in Gregory, Sales and Hegewisch (eds) (1999) *Women, Work and Inequality: the challenge of equal pay in a deregulated labour market,* London: Palgrave Macmillan.

8 S. 2, Human Rights Act 1998.

9 *R v Secretary of State for Social Services ex parte CPAG and GLC 1985 (The Times)* 16 August.

10 *R. v. Secretary of State for Social Security ex parte Re B* and *Joint Council for the Welfare of Immigrants*.

11 Public Law Project (2001) *Third Party Interventions in Judicial Review: an action research study,* p4.

12 Statement to author.

13 As above.

14 See e.g. R. Smith, 'How Good are Test Cases' in J Cooper and R Dhavan (1986) *Public Interest Law,* Oxford: Blackwell.

15 *Lord Chancellor's Direction. Scope Of The Community Legal Service Fund, Exceptions to the Exclusions,* 2 April 2001.

16 E.g., *Poplar Housing and Regeneration Community Assn v Donoghue* [2001] EWCA Civ 595; *Callin and others v Leonard Cheshire Foundation* [2002] EWCA Civ 366; *Anston Cantlow and Wilmcote and Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546; *R v Hampshire Farmers Market ex parte Beer* [2003] EWCA Civ 1056. The Parliamentary Joint Committee on Human Rights has called the result "highly problematic" (*Meaning of Public Authority under the Human Rights Act* HL Paper 39)

17 E.g., in the *Leonard Cheshire* case.

18 [2004] 2 AC 557.

19 *R v A (no 2)* [2002] 1 AC 45.

20 *See R v Secretary of State for Home Dept, ex parte Daly* [2001] UKHL 26; *A and others v Secretary of State for Home Department* [2004] UKHL 56.

21 In Daly above.

22 *R v Secretary of State for Defence ex parte al Skeini* [2004] EWHC 2911.

23 A case above.

24 Press statement, 5 August 2005.

25 See also JUSTICE (2005) *Changing the Rules: the judiciary, human rights and the constitution,* available at www.justice.org.uk.

26 See, in particular, Lord Steyn *BIICL lecture*, 10 June 2005.

27 *Gaygusuz v Austria* (1996) 23 EHRR 364 at para 42.

28 *Lord Nicholls, Campbell v MGN Ltd* [2004] 2 AC 457.

29 *A v Secretary of State for the Home Dept* [2004] EWCA 1123 (awaiting appeal to the House of Lords)

30 See http://www.justice4diane.org.uk

31 Interview with author.

32 Public Law Project (2003) *The Impact of the Human Rights Act on Judicial Review: an empirical research study*, p12.

33 As above.

Ellie Venhola, Community Legal Clinic, Ontario, Canada; Noeline Blackwell, Director General, FLAC and the Honourable Mrs Justice Catherine McGuinness, President, Law Reform Commission

Goliath Arisen: Taking Aim at the Health Care Regime in *Auton*

Ellie Venhola, Community Legal Clinic, Ontario, Canada

> The ruling was a signal that governments no longer have to worry about being forced to pay for expensive programs by special-interest groups claiming discrimination.
>
> —Canadian Press, 20 November 2004

Introduction

In 2004, the Supreme Court of Canada released its judgment in a significant case that touches upon the rights of every Canadian to publicly funded health care. In *Auton (Guardian ad litem of)* v *British Columbia (Attorney General)*[1] the infant petitioners who are disabled sought, by their litigation guardians, a determination that the *Canadian Charter of Rights and Freedoms*[2] guarantees equal receipt of and equal access to medically necessary treatment for their condition.

The families argued that available treatment provides for a socially approved quality of life for persons living with disabilities (i.e. those whose abilities are different than those typically included in the social mainstream) and that it must be funded by the government in a manner equal to necessary treatment provided to 'abled' persons (i.e. those whose abilities reflect the majority or 'norm' of the social mainstream).

They pursued a ruling that would confirm that a provincial government, when funding medical treatment services for the benefit of citizens, must not treat citizens unequally by excluding their critical needs from the Medicare scheme (Canada's health care system) where it funds medically necessary treatment for others.

The case wound its way up the appellate ladder, until the Supreme Court of Canada pronounced in November 2004 that the claimants had failed in establishing their claim.[3] The Court concluded that the respondent families were seeking both a legal right to health care that was non-existent and an unwarranted expansion of the principles of accessibility to health care services.

It was a surprising judgment in which the Court was effective in further entrenching an historical division between the roles of the judiciary and the government where political decision-making and the expenditure of public money are at issue. The Court was cautious, refraining from either brandishing the *Charter* as a sword or clasping it like a shield. Tragically, the double-edged effect of the judgment was to render the *Charter* powerless in the realm of political discretionary decision-making where individual rights and needs collide with those of collective citizens; and, secondly, to frustrate the evolution of *Charter* law.

I Injustice Proclaimed

The legal dispute emerged in 1999 when a group of British Columbia families banded together to seek from the British Columbia Supreme Court a judgment compelling the British Columbia (BC) government to fund Applied Behavioural Analysis (ABA) treatment to their autistic children under the province's medicare scheme. The treatment was not offered as an insured medical service at that time although the petitioners had requested it.

ABA/IBI has been alternately described as an intervention, a treatment, a therapy, and a form of education. It is known as Intensive Behavioural Intervention (IBI) in Ontario where it is

provided by the Ministry of Children and Youth. Its character has been the subject of much controversy. In some provinces, like Ontario,[4] the legal dispute is no longer about the benefit of the treatment. Rather, the debate is about equal access to an ABA/IBI program implemented by Ontario in 2001.[5] In *Auton* though, the efficacy of the treatment was key to the case.

The petitioner children who brought the claim in *Auton* each live with autism, a medically diagnosed disability that falls under the medical rubric of Autism Spectrum Disorders. It is a neurological dysfunction that impairs communication, cognitive and social skills. Individuals with autism may be minimally affected or they may experience significant barriers to their independence and participation in the community. The cause remains unclear and there is no cure.

ABA/IBI treatment is an instructional, interventionist program of an intensive nature that is designed to teach individuals living with autism the means of communication along with acquisition of basic living skills. Behavioural scientist O. Ivar Lovaas developed the technique in the early 1970s, conducting a well-known study on a select group of individuals with autism. Since then ABA/IBI has been refined and utilised as a behavioural program in Canada, although mainly delivered as a method of behavioural modification for patients residing in publicly funded care institutions until about 1998.

With the intervention, individuals who were once dependent on others to meet their needs could effectively reach a level of independence that would protect them from institutional care. Independence for autistic individuals who have been diagnosed with a moderate to severe form of the disability is thus learned and generalised through an intensive, combined program of behavioural modification and cognitive stimulation.

From 2000 to date, ABA/IBI treatment has been publicly available through private purchase in several provinces. Instructor therapists are employed by small businesses that also engage the services of behavioural psychologists in a supervisory capacity. In many cases, a practicing physician prescribes the treatment. The treatment is expensive, ranging from $45,000 to $75,000 per year for the optimum 35 hours per week of therapy. In the cases of some children, ABA/IBI is either recommended as necessary or prescribed by a physician.

The characterisation of ABA/IBI as a fundamental medical treatment was important to the families who petitioned the Court for a remedy because, they argued, the treatment is necessary to the health and well being of their children. It is particularly effective and necessary in relation to:

- each child's ability to achieve his or her personal potential;
- the ability of the child to remain living at home with parents/guardians;
- the ability to enjoy the dignity of independent access to public services, including health care, education and transportation, as well as the ability to more fully participate in their communities; and
- the prevention of costly institutionalisation, risk of harm and loss of liberty to the autistic individual in the future.

The evidence of the claimants was that, without ABA/IBI treatment, individuals who are affected by moderate or severe forms of the condition are generally destined to lead lives dependent on others for most of their needs. As adults, many require either supported or institutionalised living accommodation, at significant cost to taxpayers. Often, there is stigma attached to the disability, and many individuals are mishandled within the confines of societal customs, rules and practices, some finding their way into jails, psychiatric hospitals and homeless shelters when supports are unavailable or non-existent.

From a legal rights perspective, the inability to communicate coupled with compelled dependence means that autistic individuals may be prevented by the state from fully exercising

their constitutional and human rights under their own initiative – rights such as equality, liberty, autonomy, accommodation, freedom of expression and freedom of religion. Where the state has the means to provide the tools for independence to those who lack it, the argument is that it is unconstitutional for the government to deny them this opportunity, particularly where the state inherently promotes such opportunities within society as a whole.

The interests of the families who brought the claim were rooted in much more ordinary desires, though: 1) to raise their children at home, as opposed to placing them – or having them placed involuntarily – in a publicly-funded institutional setting, and 2) to provide the best opportunity available to their children in which to reach their personal potential. The hope of ABA/IBI is that, with treatment, the young adult will be able to leave the parental home to exist at least semi-independently within the local community.

At trial, the petitioners claimed that the government's refusal amounted to discrimination based on the ground of disability and further, that it violated the child petitioners' rights to life, liberty and security of the person in a manner which did not accord with the principles of fundamental justice.

II Bulls-eye in the Lower Courts

Allan J of the BC (British Columbia) Supreme Court waded though voluminous evidence and entertained complex legal argument at trial. She found that ABA/IBI is a medically necessary treatment for autistic children i.e. that it was essential to the health and well being of the individual.[6] In her view, the BC government violated the petitioners' s.15 *Charter* rights to equality by denying a medically necessary service to a disadvantaged group when a medically necessary service is provided by the government in comparable circumstances to other citizens.

The direct discrimination, she said, was rooted in a systemic, stereotypical attitude, noting "the absence of treatment programs for autistic children must consciously or unconsciously be based on the premise that one cannot effectively treat autistic children… [which is] a misconceived stereotype."[7]

Allan J found that the discrimination was not justified under s.1 of the *Charter*. She held that the "government was entitled to judicial deference in allocating finite resources among vulnerable groups" but that "this did not immunize its decision to deny funding for ABA/IBI from *Charter* review…"[8]

As a remedy, Allan J issued a declaration, awarded nominal damages in the amount of $20,000 to the adult petitioners and directed the BC government to fund intensive behavioural therapy for children with autism. She left a window of discretion open to the government, stating that "that it was up to the government, not the court, to determine the nature and extent of ABA/IBI therapy on appropriate professional advice".[9] Allan J did not find it was necessary to consider section 7 of the *Charter*.

The BC Court of Appeal upheld Allan J's decision on appeal by the BC government.[10] The Court adopted the purposive and contextual approach as approved by the Supreme Court of Canada when determining *Charter* issues:

> There is no doubt that not all refusals to treat a health care problem will be seen as discrimination. The complaint, here, however, is in the context of a severe condition which, untreated, will very likely lead to an adult life of isolation and institutionalization, and in which the individual's development has been so compromised that he or she will likely be unable to access service programs such as education, and likely will require one-on-one assistance to access other services such as health care for physical ailments.

> It is also in the context of a treatment method which holds a realistic prospect of substantial improvement in communication and behavioural skills, no alternate treatment program offered, and the certain knowledge that other serious, and indeed less serious, conditions are treated by state funded therapies…Here the complainants are greatly disadvantaged with the prospect that without treatment, they are likely to so remain for the duration of their lives."[11]

Saunders J, in speaking for the Court, considered adverse effect discrimination, quoting La Forest J in *Eldridge*, at paragraph 77:

> This Court has consistently held, then, that discrimination can arise both from the adverse effects of rules of general application as well as from express distinctions flowing from the distribution of benefits. Given this state of affairs, I can think of no principled reason why it should not be possible to establish a claim of discrimination based on the adverse effects of a facially neutral benefit scheme. Section 15(1) expressly states, after all, that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination … "(emphasis added). The provision makes no distinction between laws that impose unequal burdens and those that deny equal benefits.
>
> If we accept the concept of adverse effect discrimination, it seems inevitable, at least at the s. 15(1) stage of analysis, that the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services." [12]

Saunders J concurred with the lower court that "the discrimination lay in 'the failure of the health care administrators…to consider the individual needs of the infant complainants by funding treatment." [13]

The Court concluded that the government's refusal created a "socially constructed handicap" that further entrenched the disadvantaged position of an already disadvantaged group. The Court agreed that a stereotypical attitude had informed the government's decision because it was "a statement that their mental disability is less worthy of assistance than the transitory medical problems of others, ..." [14]

Stated Saunders J:

> I conclude that the failure of the health care administrators of the Province to consider the individual needs of the infant complainants by funding treatment is a statement that their mental disability is less worthy of assistance than the transitory medical problems of others. It is to say that the community was less interested in their plight than the plight of other children needing medical care and adults needing mental health therapy. This is a socially constructed handicap within the oversight, in my view, of s. 15 of the *Charter*.[15]

The appellate Court agreed with Allan J that the government was unable to justify its actions under s.1 of the *Charter*. Balancing the importance of meeting the needs of autistic children who could benefit immensely from ABA/IBI treatment against the objective of allocating limited resources equally amongst multiple public demands, said the Court, ought to have resulted in granting the benefit to the children.

David had felled Goliath. But it was a transitory feeling of elation for the families. The BC government sought leave to appeal the decisions to the Supreme Court of Canada. On November 19 2004, the Supreme Court of Canada released its decision, granting the appeal and dismissing the petitioners' claim.

III The Supreme Court of Canada: Goliath - 1, *Auton* - 0

The Supreme Court of Canada stated the constitutional questions as follows:

1 Do the definitions of 'benefits' and 'health care practitioners' in s.1 of the *Medicare Protection Act*, RSBC. 1996, c. 286 and ss. 17-29 of the Medical and Health Care Services Regulation, BC Reg. 426/97, infringe s.15(1) or s.7 of the *Canadian Charter of Rights and Freedoms* by failing to include services for autistic children based on applied behavioural analysis?
2 If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s.1 of the *Canadian Charter of Rights and Freedoms*?

The Supreme Court found in favour of the appellant BC Attorney General. McLachlin CJ said that while one can sympathise with the families, the issue before the Court was "not what the public health system should provide [in terms of health care service], which is a matter for Parliament and the legislature."[16] Rather, the real issue was "whether the BC government's failure to fund these services under the health plan amounted to an unequal and discriminatory denial of benefits under that plan, contrary to s.15 of the *Charter*.[17]

The Court proceeded to apply the three-part *Law* v *Canada (Minister of Employment and Immigration)* test to determine whether the claim could succeed. In order to establish discrimination, the Court was to consider:

i Whether a law imposes differential treatment between the claimant and others, in purpose or effect;

ii Whether one or more enumerated or analogous grounds of discrimination are the basis for differential treatment; and

iii Whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.[18]

At the first stage of the test, the Court reviewed the legislative scheme that conferred authority on the BC government to make decisions relating to the provision of publicly funded benefits in the form of medical treatment, to determine whether differential treatment could be established in purpose or effect.

The Court noted that, in British Columbia, such decision-making is guided by the provisions of both the Canada Health Act [19] (CHA) and the Medicare Protection Act [20] (MPA) and its regulations.

McLachlin CJ, writing for a unanimous Court, concluded that the BC government was not obligated to provide, or to pay for, the costly treatment. A judicial review of the legislative scheme ascertained that the legislation did not promise that all Canadians would receive publicly funded health care services for all medically necessary treatment.[21] Indeed, such limitations are an anticipated feature of the province's legislative scheme.

The Court noted that the CHA stipulates that federal health care transfer payments will be allocated to provinces for medically necessary 'core' services as long as they are delivered by a licensed physician or in a hospital. The MPA, said McLachlin CJ, confers the authority on the BC government to make discretionary decisions regarding all other 'non-core' health care services, because these services are not statutorily covered by the CHA.

The Court held that the executive branch is thus free to target the social programs and benefits it desires to fund as a matter of public policy. This is not to say that the *Charter* has no jurisdiction over government action. When *providing* the designated benefits, governments must administer the benefits in a manner which both accords with *Charter* guarantees and which does not offend *Charter* and human rights principles. [22]

McLachlin CJ identified a larger issue underlying the analysis at the first stage of the Law test. She noted that the issue of whether the legislative scheme was discriminatory on its face or by effect was a necessary consideration when determining differential treatment. The Court referred to historical decisions of the Court in which it was repeatedly held that Parliament and legislatures are not obliged to create benefits for the public. [23]

Thus, the Court implied, there are no constitutionally guaranteed rights to receiving particular health care benefits. There is a legal right to receive *core* benefits from the government, if those benefits comply with CHA criteria but there is no independent legal right to receive non-core benefits under the law. Further, if the courts obliged the government to provide non-core medical services to all disabled persons and people associated with other enumerated and analogous grounds then "…a class of people legally entitled to *non-core* benefits would be created." Stated McLachlin CJ: "This would effectively amend the scheme and extend benefits beyond what it envisions…". [24]

The Court went on to consider whether the excluded benefit of ABA/IBI treatment was a benefit that the legislation had reasonably intended to include in its scheme. McLachlin CJ characterised ABA/IBI treatment as a non-core health care service because the treatment was not provided by a practicing physician or within a hospital. Thus, omitting ABA/IBI treatment as an insured non-core health benefit was properly a matter of choice within the lawful discretion of the BC government.

McLachlin CJ pointed out that, in any event, the existence of a benefit must be established as a condition precedent to *Charter* review. Section 15(1) states:

> Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law, without discrimination, and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. [25]

Charter review by the courts, she continued, is limited to a review of the by-product of the statute or regulation. The language of the *Charter* " …confines s. 15(1) claims to benefits and burdens imposed by law." [26] Moreover, there is a need for the benefit claimed or burden imposed to emanate from the law as result of language of s. 15(1) as well as jurisprudence, she concluded. [27] The core issue to the Supreme Court, then, was whether the benefit claimed emanated from the law or was one conferred by law. [28]

The Court concluded that the benefit claimed was funding for all medically necessary services. This was not a benefit provided by legislation. Moreover, it could not be demonstrated that the legislative scheme had a discriminatory purpose, objective, policy or effect on the claimants. [29]

This finding was enough to dispose of the claim, but because *Auton* was the first of its type to reach the Court, McLachlin CJ proceeded to comment upon the second stage of the *Law* test, in *obiter*.

The second part of the *Law* test requires the Court to first determine the appropriate comparator group and secondly to ask whether the claimants were denied a benefit as compared with the people identified in the comparator group. Differential treatment might then be established by showing direct discrimination through a clear distinction or by showing that the singling out of the claimant for inferior treatment on an enumerated or analogous ground had the adverse effect of indirectly discriminating, contrary to the *Charter*. [30]

It was the Court's view that the lower courts had erroneously defined the appropriate comparator group. Allen J had, at trial, identified non-autistic children or mentally disabled adults as the comparators. She also noted that "…as children and mentally disabled, [the petitioners] are doubly vulnerable." [31]

Apparently, the lower Court had conducted a faulty legal analysis. McLachlin CJ determined that the real comparators were members of non-disabled groups or members of a group who lived with a disability other than a mental disability *and* who request or receive funding for new treatments from the BC government under the non-core medical services branch of the legislative scheme. [32]

The Court further determined that ABA/IBI was an emerging treatment, not eligible for inclusion in core services as provided for under the CHA because ABA/IBI was not delivered by a doctor or in a hospital. [33] The Court found that there was no evidence on record that would illuminate the actions of the BC government in responding to other requests for novel treatment by comparator groups. The petitioners were not treated differently as compared to other citizens requesting emerging treatment and the decision of the government did not differentiate the petitioners. As a result, the second stage of the *Law* test was not met; neither direct differential treatment nor differentiation by effect could be established. [34]

The Court proceeded to answer the constitutional questions relating to breaches of the *Charter* in the negative. An examination under s.1 of the *Charter* was thus unnecessary.

III Goliath's Offensive: Slinging the Fatal Catapult Shot

The Supreme Court framed the case as a demand that the BC government provide a particular health service as a mandated benefit under the CHA or, alternatively, as a discretionary benefit under the provincial medicare scheme. Either way, the families were seeking a legal imperative compelling the BC government to provide an unproven health service, claiming that it would be unconstitutional to not provide it.

The Court concluded that the families were making an unreasonable request of both the Court and of the BC government, adopting the position of the Attorneys General. In their view, ABA/IBI treatment was not statutorily mandated and that the claimants could not individually compel the provincial government—which has the exclusive power to make discretionary political decisions about what kinds of medicare services to insure under its provincial medicare schemes—to provide ABA/IBI as a certain health service.

On appeal, the government continued to deny any form of discriminatory behaviour: numerous programmes and services in BC were already provided for families of children with autism, such as infant development, supported child care, respite, occupational, physical and speech/language therapy and alternative behavioural support. In addition, autistic children are entitled to access basic and emergency health care of a universal kind in need, as offered to every resident of the province under the provincial medicare scheme. The MPA, the appellants argued, "…is not structured or designed so as to effectively prevent the Petitioners from accessing the same services the [Act] makes available to all."[35] The legislation could not directly discriminate or discriminate by effect against the Petitioner children because it did not differentiate between the Petitioners and others when there was no public health service available to others for which the children do not qualify.[36]

The Attorney General conceded that "while the system is under-inclusive in that it fails to cover the petitioner's therapy of choice…",[37] the problem was that the families were asking for an additional service in the form of the 'gold standard' treatment—luxury as opposed to necessity. It wasn't a matter of not wanting to provide it to the claimants, said the province. The government was restrained by finite resources that had to be allocated to all residents equally. If Ontario, or other jurisdictions could provide ABA/IBI to their residents, it was because these other jurisdictions were financially capable of funding the treatment.

The substantive principle of law to be considered, said BC, is that judicial intervention is always unwarranted where inferences of discrimination short-circuit the democratic processes of government. This includes the administrative and policy-based processes that balances efficacy and the allocation of scarce resources for competing health care needs.[38]

"The reality," said the BC Attorney General, "is that people diagnosed with a severe disability like autism, or fetal alcohol syndrome, or even a severe learning disability, will feel offended and wronged when treatment for their condition is not publicly funded." Paraphrasing Allen J, the appellant said, "…they will find no comfort knowing they too may be eligible for [cancer therapy or massage therapy]; they want treatment for their autistic condition as well…".[39]

Decisions to fund various treatments, said the Attorney General, "are not judgments about the worth of individuals in the sense contemplated by section 15; they are decisions made about the best way to allocate finite resources across a range of demands and opportunities to ensure the highest standards of health for the population of the province."[40]

The appellants warned that, if the government's discretionary decision-making ability is destined to be "viewed through a judicial lens which converts any decision to deny, delay or disappoint into a moral judgment" and, further, is imbued with a "discriminatory animus" then the Court will be pronouncing a constitutional right to particular health services for preferred groups of individuals. The consequences would be contrary to the core values of the Constitution – it would mean lower funding for health care services to others, "other allocations of resources that are not subject to judicial review", and "new opportunities and obstacles overnight".[41]

In its submissions, Ontario's Attorney General stated that s. 15(1) of the *Charter* does not authorise courts to wade into the "soft law"[42] or "policy pool of program creation."[43]

> While the establishment of such a new program may prove to be good public policy, nothing in the s.15 jurisprudence suggests a positive obligation on the state to establish a new program.[44]

Ontario claimed that the real issue was whether individuals could compel a provincial government to provide "a discrete service…that will help alleviate…general disadvantage." This was not a case in which the claimants, like those in *Eldridge*,[45] were seeking "equal access to services that are available to all."[46]

Here, Ontario posited, the claimants were making an impossible bid for funding for "an entirely new service outside the parameters of the kinds of services funded by the existing health care system."[47] Even if the treatment was beneficial, a medical 'recommendation' by a health care practitioner did not raise the service to the level which would attract constitutional protection under the CHA or provincial legislation. [48]

Ontario relied on an academic article written by Donna Greschner and Stephen Lewis to support its claim that constitutionality was a 'red herring', in which the authors post-trial asserted that: "…[*Auton*] is about seeking a bigger share of the resource pie; it does not engage basic questions of citizenship, the fundamental value captured by the principle of universality…".[49]

The unassailable nature of the decision-making power attached to the allocation of public resources, BC declared, is rooted in Canada's constitutional division of powers. Our national constitution confers upon the executive branch of provincial government the exclusive jurisdiction to make executive (legislative and administrative) decisions involving the expenditure of a province's tax dollars.

There was no dispute between the parties that, if the government provided a public service and if a *prima facie Charter* violation by the government could be established in the delivery or allocation of that service, then it was incumbent upon the Courts to intervene when asked to determine *Charter* violations.

But in this case, the BC government had chosen to *not* provide ABA/IBI treatment as a medicare service. Therefore, said BC, the legal doctrine of exclusivity and separation of powers precluded the Court from second-guessing the discretionary decision.

The claimants brought out the heavy artillery of *Granovsky*, *Law*, *Eldridge* and *Vriend*—each a heavyweight with respect to protecting the rights of the disabled and the disenfranchised. The impact was minimal, though, not much more than buckshot in the trees when fired up against the government's munitions of discretionary 'benevolence'.

The Supreme Court distinguished *Eldridge* and *Vriend* by refusing to frame *Auton* as an access to services case or as a case of simple underinclusion.

IV Instant Replay — Behind Goliath's Bob & Weave

A The Tao of Disability Law

We were warned. In 1998 Grant and Mosoff [50] envisaged such an objectionable outcome. Given the dichotomous judgments in *Eaton* [51] and *Eldridge* it was bound to happen, they predicted.

In *Eldridge*, the Supreme Court of Canada analysed the issues of disability from the norm, which was inherently a position of ability, said the authors. [52] The goal of the bench at that time was to accommodate the different abilities of the deaf claimants so as to facilitate access to pubic health services previously inaccessible. This would provide the claimants with an experience as close as possible to the experiences of the abled consumer. [53]

The Court was faced with *Eldridge* shortly after *Eaton*. Emily Eaton was a child living with physical and mental disabilities. Her parents wanted to have her placed in a regular classroom environment with special education supports. Instead, the Court directed that she be placed in a segregated special education classroom, on an appeal from a decision of the Ontario Special Education Tribunal. "In *Eldridge*, the nature of the benefit (accessing the health care system) and the nature of the accommodation (the provision of interpreters) were both clear. Participating in the "social mainstream" meant using the health care system. In these circumstances, the accommodation would make the deaf patient indistinguishable from the hearing patient. The Court was able to find discrimination by emphasising how the typical person experiences this benefit." [54]

The *Eldridge* Court adopted the *Eaton* Court's "sink or swim" theory wherein the *Eaton* Court held that the attribution of stereotypical characteristic based (i.e. race or gender) reasoning was an inappropriate test for disability claims. If one does not allow for the condition of disability, said the Court, one ignores the disability and forces the individual to sink or swim in the mainstream environment. This was improper reverse stereotyping. [55]

The Supreme Court believed that Emily Eaton would not be able to swim in the mainstream environment even with available accommodation and concluded she would surely sink. But in *Eldridge*, the Court believed that the deaf claimants could swim in the mainstream with available accommodation.

The difference in reasoning might be explained by the Court's distinguishing the nature of the benefits requested in each case. Grant and Mosoff describe it thus:

> In *Eldridge*, the nature of the benefit (accessing the health care system) and the nature of the accommodation (the provision of interpreters) were both clear. Participating in the "social mainstream" meant using the health care system. In these circumstances, the accommodation would make the deaf patient indistinguishable from the hearing patient. The Court was able to find discrimination by emphasizing how the typical person experiences this benefit. [56]

Grant and Mosoff claim that, in situations where the benefit is not so concretely defined as interpretive services in *Eldridge*, accommodating difference is much more of a challenge. The

benefit of general education is much less distinctive than sign language interpretation service and thus becomes more problematic.

Emily Eaton was judicially excluded from the mainstream experience because she was perceived to be "too different from her abled peers".[57] The problem, according to Grant and Mosoff, was that Eaton "was so different from the typical child…that the Court was unable to apply the same standard."[58] Because the judges could not imagine Eaton having an experience of life resembling the norm, Eaton was accommodated within a substitute system so as to facilitate interaction in an alternative social stream inclusive of those who are different – and less privileged- than the norm.

Rather than recognise segregation as systemic differentiation of the nature engaging historical prejudice, the Court considered exclusionary accommodation as merely an adjustment to the education segment of the mainstream community, which – fortunately – responded to the best interests of Emily Eaton in the view of the judges.

Grant and Mosoff identify another fundamental difference between the *Eaton* and *Eldridge* judgments. In *Eldridge*, the Court construed a standard form of health care as attracting universal entitlement. The requested benefit of sign language interpretation would permit access to standard health care (to persons who could then experience similar care as the mainstream). This was a good thing.[59]

In *Eaton*, the Court rejected the idea that there was a universal entitlement to a standard form of education. The requested benefit, i.e. placement in a regular classroom with special education support might permit access to an education. But in *Eaton*, the Court instead adopted a paternalistic reliance on the opportunity for an alternative special education. The Court perceived that Emily Eaton would not be capable of an educational experience as close as possible to the experiences of mainstream pupils. The Court's decision would, in effect, 'save' Eaton from being forced to sink within the mainstream classroom because she was too unlike the mainstream pupils. Yet, say the authors, it was the Court's stereotyping of Eaton's differences that "made the Court unable to apply the standard of education that applied to her more 'able' peers."[60]

Grant and Mosoff point out that, if the Court had characterised the benefit in *Eaton* as access to mainstream education in order to prepare children to participate and function in the world as it subsequently did in *Eldridge,* the discrimination question would have been answered differently.[61]

Thus, the Court's failure in *Eaton* to understand the importance of mainstream inclusion and its failure to recognise the pejorative emphasis on the 'abnormal' in its desire to do the right thing poses a real danger to the achievement of full citizenship for persons living with disabilities. The authors warned us about this potential step backwards and it has come to be realised.[62]

Sources of Systemic Discrimination

In their submissions, the petitioners and the interveners supporting them made a claim of systemic discrimination by the government of BC. The discrimination, they said, was evident in a pattern of neglect by the government such that the treatment of the underlying condition of autism was persistently avoided. As I will show later, the BC Court of Appeal emphatically embraced this position.

It was asserted that the effect on the claimants was that they felt excluded, disrespected and lacking dignity. The *Law* test is generally perceived as insufficient to address this critical issue. As joint interveners Legal Education and Action Fund (LEAF) and Disabled Women's Network Canada (DAWN) observed:

> The *Law* test includes a 'checklist' of factors that are often applied in a mechanistic fashion, despite the Court's direction to the contrary. The focus on formalistic rules acts to decontextualise systemic inequality analyses. Moreover, some of the factors from *Law* can be improperly used to overemphasize a focus on the purpose rather than the effects of the law or policy in question. [63]

Systemic discrimination is harmful and engages the violation of human dignity. The concept of dignity is an element to be considered under the third branch of the *Law* test, if the analysis proceeds to that stage. According to LEAF and DAWN:

> Discrimination can include experiences of exploitation, marginalization, powerlessness, cultural imperialism, violence, historical disadvantage, and exclusion from the mainstream of society. These experiences are indicia of inequality that are pertinent to the purpose of s.15.
>
> To fulfil the special role of s.15, focus must be on the promotion of equality. The concrete power relations at the source of discriminatory behaviour must be examined to link more clearly the impugned law or (in)action to the relations of domination that perpetuate and rationalize the systemic inequality of oppressed groups. In this case the resulting experience of marginalization, powerlessness, non-disabled imperialism, and potential violence are all profound indicia of inequality and injury to dignity. [64]

It was an issue that fell by the wayside because the claim never made it beyond the first stage of the legal test.

a) Soft Law

In *Auton*, the claimants directed their *Charter* challenge to *the policy underlying the medicare scheme in BC* and to *the application of the policy* to the welfare of the child claimants.

Laura Pottie and Lorne Sossin declare that it is time to re-examine the boundaries separating judicial and executive roles and to question whether they "are tenable or desirable" in the context of social policy decisions. [65]

The tightly drawn line between political decision making and judicial review hampers the maturing process of administrative law reform in public law, they state.[66] For disadvantaged individuals who seek to exercise social welfare rights, the capacity to challenge soft law (in the form of government policy and policy instruments) is "illusory".[67] Yet, argue Pottie and Sossin, policy is the very fabric of discretionary decision-making and the courts are not restricted in their judicial review of soft law with respect to *Charter* compliance.

In fact, they maintain, the Supreme Court's academic differentiation between soft law instruments, legislation and government action is regressive and "is not an answer to *Charter* applicability". [68] The authors observe:

> The Court's deference and efficiency arguments are misplaced, since a refusal to review policy instruments leads only to more litigation, less effective remedies and protection of *Charter* rights, and potentially less deference to legislative choice of policy-implementing instruments. [69]

While deference and efficiency may have broad implications in law, "they are of particular concern in the social welfare context" [70] where they may give rise to broader remedies of wider application. For those citizens who rely on social welfare for their well-being, broad remedies can ensure real substance and meaning to the intent and purpose of the *Charter*.

Pottie and Sossin quote La Forest J in *Eldridge* in support of their position. A government policy is a decision writ large, they claim and as such it ought to be consistent with *Charter* values.[71] La Forest J clearly confirms this:

> …Thus, the limitations on statutory authority which are imposed by the *Charter* will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.[72]

The characterisation of a decision as being 'policy' does not shield it from *Charter* scrutiny in *Auton*. The *Charter* applies to a wide range of government action. In fact, McLachlin C J and Bastarache, J in *Bell Canada* had already jointly concluded that policy guidelines are a form of law.[73] Just as the Court was able to direct the government to create a new benefit in *Eldridge*, it has embraced its jurisdiction to direct the government to adopt a new legal aid policy in the case of *G.J.*.[74]

Consider the effect of refusing to direct *Charter* remedies where they are appropriate and most effective, suggest Pottie and Sossin. Repetitive litigation will ensue. Forcing vulnerable claimants into court is not an answer, either. The result would be an unfair burden on the claimants who possess little in the way of resources, making litigation implausible.[75]

In *Falkiner*,[76] a 'spouse in the house' case in which the definition of 'spouse' was challenged as unconstitutional, the Ontario Court of Appeal confirmed that the social welfare system must comply with the *Charter*. Social welfare decision-makers are obliged to provide sufficient reasons establishing the correctness and constitutionality of their decision—otherwise the decision is subject to judicial review.[77]

Policy concerns underlying the *Auton* decision were identified by Saunders J at Court of Appeal:

> As in the *Eldridge* case, it is not the legislation itself, but a failure to give relevant effect to the legislation by appropriate policy and by appropriate legislative and administrative action which has raised the question of the violation of *Charter* rights. The application of the legislation is said by the petitioners to be wrongly under-inclusive and through being wrongly under-inclusive, a violation of their *Charter* rights.[78]

The executive must be held to account for the discretionary decisions they make, "including the development and content of soft law", state Pottie and Sossin.[79] The goal is not "to invite the courts to micro-manage the administrative process but rather to ensure the process itself accorded with the principles of fairness, reasonableness and the rule of law."[80]

b) Systemic Discriminatory Attitudes

The concept of systemic discrimination has been abundantly canvassed in Canadian human rights jurisprudence. In *C.N.R.* v *Canada (Human Rights Commission),*[81] the Supreme Court described it as a pattern of practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics.[82]

Ena Chadna and Laura Schatz have reviewed the notional frameworks of disability and stress that "Canada continues to be rooted in the prejudicial economic notions of disability."[83] The most prevalent and destructive model is economic in character:

> In the economic model, an individual with a disability is seen as a person who embodies a cost and these costs pose an economic liability on the state. Since this cost must be factored into society-wide public policy decision on resource allocation, disability becomes a socially created category of dependency."[84]

Public dependency is a negative trait and results in a state-induced attitude of charity and pity towards disabled individuals who are excluded from the mainstream and who are unable to achieve independence. In other words, say Chadna and Schatz, state benevolence is provided

only to those who can establish the most need in terms of severity.[85] This "pervasive stereotype" results in the reinforcement of "a prevailing myth that persons with disabilities are not valuable contributors to society.[86]

In the case of children living with autism, the cost embodied is largely borne privately by the families of the children. It may be, too, that children are not typically valued as contributors to society until nearing the age of majority. Ironically, the claimants' argument was that not even children who could establish the most severe forms of autism had their needs met by the province. Despite access being available (by means of their caregivers) to generalised health care, Allen J noted "it is immediately obvious that none of those services, except [alternative behavioural support] even attempt to treat the condition of autism."[87]

The authors refer to the judgment of La Forest J in *Eldridge* in which the Court evaluated systemic discrimination:

> Persons with disabilities have been too often excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to individual stereotyping and relegated to institutions…This historical disadvantage has been to a great extent shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the "equal concern, respect and consideration" that s.15(1) of the *Charter* demands. Instead they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the mainstream has been conditional upon their emulation of able-bodied norms…[88]

In *Law*, the Court explored the notion of human dignity, articulating it as a central objective of s.15. Said the Court:

> …It may be said that the purpose of s.15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping or political or social prejudice…
>
> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment.
>
> It is enhanced by laws that are sensitive to the needs, capacities, and merits of different individuals…Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee… concerns the manner in which a person legitimately feels when confronted with a particular law."[89]

Saunders J candidly admonished the government for its failure to accommodate the dignity of the *Auton* claimants. The systematic avoidance strategies of the Crown belied an attitude of systemic disregard towards the petitioners, conduct which must, she implied, be the product of systemic discrimination. She stated:

> The four adult petitioners were consistently denied or refused funding for Lovaas Autism Treatment for a significant period, measurable in years and not in months, from when they were first told by their medical advisors that the infant petitioners ought to be receiving Lovaas Autism Treatment, or the equivalent, and from when the four infant petitioners were first started on the treatment at the expense of the four adult petitioners, respectively.
>
> After some time, during which the Crown was persistently asked to fund the treatments, the decision of the Supreme Court of Canada was handed down in *Eldridge*. In my opinion, a fair assessment of the effect of that case, by Crown

> officers and their legal advisers, should have made the Crown officers aware that in continuing to refuse to fund Lovaas Autism Treatment for the infant petitioners they were breaching the *Charter* rights of all four infant petitioners. A further year passed, and on 14 August, 1998 the petitioners started these proceedings. At that stage a refusal on the part of the Crown to fund Lovaas Autism Treatment for the four infant petitioners, who, through the adult petitioners, had asserted their *Charter* rights in circumstances not readily distinguishable from the circumstances in the *Eldridge* case, gave rise to what can be called either a state of inertia or a state of stubborn recalcitrance on the part of Crown officers, sufficient, in my opinion, in its prolonged obstructiveness, to engage the necessity for some form of financial award as part of an effective remedy under s-s.24(1) of the *Charter*.[90]

At the Supreme Court, the government of Ontario exhibited such a discriminatory approach. As noted *infra*, one might conclude that Ontario's caution about converting a decision to deny or delay into a moral judgment, imbued with a "discriminatory animus"[91] reflects a pattern of arrogant disregard for the critical health care needs of citizens and signals the existence of inappropriate desire to exercise state power with immunity.

One might also reasonably question how it is possible to deny or delay funding for a critical health need without making a moral judgment about who is most deserving of funding. Moreover, blustering about constitutionalising particular health care benefits may be a 'red herring' tactic, one might conclude, because the core values of the Constitution entrench an equal right to health care when health care is provided by the state, and the failure of providing for the health care need adversely affects one's dignity and ability to participate in and contribute to society.

The concept of discrimination tends to be amorphous. We know that discrimination occurs when a person suffers disadvantage or is denied opportunities available to other members of society because he or she has certain personal characteristics that are perceived to be different than the norm, are apparently impenetrable and the person is consequently approached with apprehension. Explains Margot Young, "the further away a claimant is from the mainstream, privileged norm, the more difficult it will be for her or him to persuade the Court it is the norm, not the individual, in which the fault lies."[92]

c) Positive Obligations of the Crown

The Court in *Eldridge* steered away from commenting on whether s.15 obliges the government to identify and remedy systemic inequalities, observe Grant and Mosoff.[93] This stance would be, in part, a manifestation of the same legal doctrine of exclusivity espoused by the Court and the Attorneys General in *Auton* in which the Courts will carefully avoid breaching the executive and administrative boundaries that protect and shroud political decision-making.

Saunders J of the BC Court of Appeal considered whether the BC government had a positive legal obligation to provide the benefit of ABA/IBI to the *Auton* petitioners. The government insisted that:

> ...the administration of the system does not discriminate against the infant petitioners because s.15 is not intended to eliminate the functional limitations created by the affliction but rather that the prohibition of discrimination on an enumerated ground is intended to prevent socially constructed handicaps, which autism or ASD are not.[94]

In response, Saunders J held that the extent of the government's obligation under the health care scheme bears upon the root of discrimination.[95] She emphasised that, while not all refusals to treat a health condition will be discriminatory, this was a case where the primary

need of the children were not being met. Without disturbing the findings of Allen J that ABA/IBI treatment was the only effective treatment for the children, she stressed that the absence of treatment:

> …will very likely lead to an adult life of isolation and institutionalization, and in which the individual's development has been so compromised that he or she likely will be unable to access service programs such as education, and likely will require one-on-one assistance to access other services such as health care for physical ailments. It is also in the context of a treatment method which holds a realistic prospect of substantial improvement in communication and behavioural skills, no alternate treatment program offered, and the certain knowledge that other serious, and indeed less serious, conditions are treated by state funded therapies.[96]

Allen J at trial held that the social disadvantage borne by the children was directly related to their inability to benefit equally from the health care scheme provided by the government. She stated:

> Here funding appropriate treatment for autism is entirely consistent with the ameliorative purpose of the health legislation. The Medical Services Plan is designed to assist people with health care needs. As stated in *Eldridge*, *supra,* the values of the health care system are to promote health, prevention and treatment of illness and disease and to realize those values through a publicly funded health care system. Having created a universal medicare system of health benefits, the government is prohibited from conferring those benefits in a discriminatory manner. In the case of children with autism, their primary health care need is, where indicated, early intensive behavioural intervention.[97]

Bruce Porter, of the Centre for Equality Rights in Accommodation (CERA) criticises the failure of the judiciary to recognise a positive obligation arising from the *Charter* in relation to social welfare rights:

> Giving primacy to the court's role in ensuring that the needs of marginalized groups are not ignored by legislatures relies on a reaffirmation of the positive, remedial component of equality rights. The majority of the Court affirms for the first time in *Eldridge* and again in *Vriend* that section 15 guarantees "substantive" as well as "formal" equality.[98]

While early *Charter* cases were assessed as circumscribing the limits of positive duties of the government, he says, these judicial findings were made within the model of formal equality, as opposed to substantive equality. The Court approached the issue with mounting conservatism and over time replaced this view "by comments suggesting that the issue of positive obligations had somehow been decided in the negative."[99]

Porter points to a watershed moment when La Forest J in *Eldridge,* took a solid run at the notion of positive obligations, effectively advancing the scope and application of the *Charter*:

> In their effort to persuade this Court otherwise, the respondents and their supporting interveners maintain that section 15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action. Adverse effects only arise from benefit programs, they aver, when those programs exacerbate the disparities between the group claiming a section 15(1) violation and the general population. They assert, in other words, that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantages of those benefits.
>
> In my view, this position bespeaks a thin and impoverished vision of section 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence.[100]

He points to La Forest J's adoption of the Court's majority decision in *Haig* that "a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of section 15."[101]

But the Court in *Eldridge* fell short of establishing a positive obligation rule to bind the government because it missed the point. The Court distorted the issue, says Porter, framing it as statutory underinclusion. He adds that, in order to 'fit' the case into the existing s.15(1) framework, the Court created "a kind of mythical 'legislative act' or 'decision of elected legislators'" that "exaggerated the case for judicial deference to the legislature." The discrimination at issue in *Eldridge,* he argues, "was not really tied in any direct way to an act of the legislature or even to decisions of elected representatives not to act."[102] Rather, the real issue was:

> …that those who had the authority and the means to ensure that such services were provided…simply ignored the needs of a marginalized group.
>
> In other words, it would no longer be correct to state that the government has no obligation to provide maternity benefits but once provided, must do so without discriminating. The approach adopted by the unanimous Court in *Eldridge* suggests that a failure to provide for the needs of pregnant women would infringe section 15 because failing to provide for such a need would discriminate against women, who need the benefit, in comparison to men, who do not.
>
> The violation of section 15 at issue in *Eldridge* did not arise when any particular legislation was passed and proclaimed or any particular decision made pursuant to the legislation. It was at the point when the need arose and government or its delegates failed to respond that a violation of section 15 occurred.[103]

The resulting judgment determined that the government had a responsibility to address the need for interpreter services through various options and that the government had failed to live up to that responsibility, states Porter. The Court has so far neglected to take a hard look at substantive equality rights:

> The point of the purposive approach emerging from *Eldridge* is to focus on the inequality that needs to be remedied by the provision of a service or benefit rather than on the question of how the inequality is connected to an existing statute. Once it is accepted that a government has a responsibility to meet certain needs of disadvantaged groups, which the Court accepts in *Eldridge*, then the failure to meet these needs constitutes a violation of section 15 at the moment the need arises and is ignored.[104]

Porter refers with pointed emphasis to Iacobucci J's frustration with the "daily gripings about judicial intrusions under the Charter:

> Indeed, hardly a day goes by without some comment or criticism to the effect that under the Charter courts are wrongfully usurping the role of legislatures. I believe this allegation misunderstands what took place and what was intended when our country adopted the Charter…[105]

B The Auton *Legacy — If You Can't Be A Good Example, At Least Be a Horrible Warning*

The Goliath of government arose in *Auton*, mustering significant public resources to assert the 'right' to a perceived powerful monopoly on discretionary decision-making. Alas, the Supreme Court of Canada bowed to such persuasion. In my view, this was not a case about disability rights. Goliath might as well have brought the action, seeking an endorsement from the Court that the economic interests espoused at the will of bureaucratic administrators shall always supersede substantive equality rights.

It is difficult to reconcile the reasoning of the Supreme Court in *Auton* in light of the existing *Charter* jurisprudence and when one considers the persistent criticisms of academic legal theorists and practitioners.

Notably, it is odd that the Court has weighed in so heavily on the side of Goliath when the Court has reviewed the discretionary decisions of the government in the past and found discrimination. In *Eldridge* the Court did direct the government to create, to fund and to provide a discrete new benefit to a particular group of citizens based on a critical need. It did determine what the government should provide in respect of health care policy and services, despite that the subject matter was a matter for the provincial legislature and only spoke to access to health care. However, the Supreme Court took great pains to distinguish *Auton* from the body of law that came before it.

In *Auton*, the government did not dispute the fact that many of the children, without effective intervention, would face institutionalisation as adults at great cost to the state. While these children are young any economic liability of the government is deferred as a practical matter to the family. The political choice of refusing to fund effective intervention such as ABA/IBI can be viewed as an economic decision to defer the cost of caring for severely autistic individuals until such future time as they will need to depend on state care.

The government did not consider it necessary to factor the cost into social policy decisions on resource allocation in this case because parents bear the cost personally. Arguably, this is the legal obligation of parents.

Despite the fact that ABA/IBI intervention furthers social independence, the government may deceive itself that it has avoided creating situations of social dependency for these children. Factors such as the significant expense and persuasion that the treatment was novel (despite the fact that other provincial governments were providing it) served to convince the government and the Court that the choice to refuse the benefit was a sound one.

The Court side-stepped the degree to which the source of the discrimination lay in the exercise of discretion rather than the scope and ambit of the medicare scheme. Of equal significance to the Court's determination – but absent from it – was the nature of the impugned policy which dictated decisions about meeting the important needs of the disabled and approving new treatments under the medicare scheme and whether the *Charter* rights of the claimants were ever considered.

The Court mischaracterised the issue at the heart of the case, asking whether the government was obligated to meet a particular health need of the claimants under the legislative scheme. The Court found that it was not, because the medicare scheme was a discretionary regime created in law to permit the exclusion of some individuals and groups from the ambit of health care. The exercise of discretion in such permitting such exclusions was a matter within the sole jurisdiction of the state.

The real issue, however, was whether the government failed to give relevant effect to both the remedial medicare scheme and the *Charter* by adopting inappropriate policy and improper administrative action. In doing so, did the government ignore the primary needs of a marginalised group (compared to its provision of less critical benefits to less vulnerable groups), exclude them from the enjoyment of society's benefits, harm their dignity, and fail to rectify and prevent discrimination against them? Sadly, there lacked any meaningful consideration of international law instruments about the rights of children, an absence that speaks more to the privilege of power than it does to the fundamental purpose of Canadian human rights law.

The Court erred in veering away from a purposive and contextual interpretation of s.15(1) to literally construe the notion of 'benefit', contrary to the objectives of s.15(1). The prayer for

relief of the families was misconstrued when the Court framed it as a request for all medically necessary services. Further, the Court narrowly constructed a comparator group to exclude the claimants. Both of these strategies provided justification to reject the claimants' position under the *Law* test.

In essence, the Court connected the alleged discrimination directly to the legislative scheme, which then was strictly interpreted. The result was that the Court ignored the actual source of the discrimination and declined to determine whether, in real life, the policy and its application had a discriminatory effect on the children.

Unfortunately, it appears that the Court engaged in a stereotypical charactersation of the children. If the Court perceived that they might never be able to "swim" in the social mainstream, there could be no immediacy to their situation – the need may never be concretely addressed as the Court was able to do in *Eldridge*. This was not a matter of what the executive reasonably intended to *include* in its medicare scheme; the focus instead was on what could be reasonably *excluded* without attracting judicial review.

It may be, too, that the *Auton* case was too intimately connected with the difficult issues of social and economic rights that emerged with some clarity in the pre-*Auton Gosselin* case. If the fear of the Court is that these previously unaddressed rights will infringe upon and upset the democratic process, one would hope that the Court would be prepared to tackle the issue directly. The bob-and-weave strategy tends to subject groups such as autistic children to further disadvantage as well as to stigmatisation as 'special interest groups'. A reasonable person would agree that the impact is distasteful: special interest groups are rarely seen as equally deserving of concern, respect, consideration and certainly not deserving of getting what they *want*.

This was a missed opportunity to advance the efficacy of the *Law* test, for application to matters that challenge discretionary decisions of government relating to the provision of social benefits on a case-by-case basis.

Although this paper does not intend to focus on the failings of the *Law* test, which is a topic vigorously debated elsewhere, one might suggest that, to be consistent with s.15(1) of the *Charter*, the Court ought to have asked:

1. Do the claimants suffer social, political and legal disadvantage in society?
2. Was there a primary need of the claimants identified by the government which if left unmet would result in these claimants would not having the resources to take full advantage of all public benefits and enjoyment of society?
3. Was the failure to meet the need based on a stereotypical assumption or a perception that funding for the benefit was less worthy of attention than funding other established benefits?
4. If so, what was the source of the discriminatory perceptions – were they based on the government's policy statements or did they emanate from the attitudes and actions of administrators?
5. If the government refuses to meet the identified need, will the denial result in a failure to rectify existing differentiation based on the impugned ground and prevent future discrimination against the claimants?
6. If government does not meet the identified need, will such a decision promote a society in which the claimants are secure in the knowledge that they are recognised at law as human beings equally deserving of concern, respect, consideration and receipt of benefits in respect of funding for their identified need?

For individuals who are not 'abled', it is incumbent on adjudicators to craft an individual remedy that is barrier-free, whether it be to enjoin the person in the abled mainstream world or to adjust segments of mainstream community to reflect the world of the differently abled so that full citizenship – relative to the individual – can be achieved.

The *Charter* is a constitutional instrument, encompassed within the supreme rule of law. Pursuant to section 52 of the Constitution Act the government is bound to consider and apply the *Charter* to its decision-making process. In *Auton*, the Court overlooked the prospect of ensuring that the governments consider and apply the *Charter* to effect a just result. Litigation prevention, as it were.

IV Assessing the Damage

When reviewing the case from a principled legal perspective, the only reasonable conclusion was that the claimants in *Auton* established that the legislative choice not to accord a particular benefit clearly demonstrated a policy and effect which offended the very principle the Court identified as key: that it is not open to Parliament or legislation to enact a law whose policy objectives and provisions single out a disadvantaged group for inferior treatment.[106]

At the end of the day in *Auton*, the BC government, sibling provinces and Attorney General of Canada persuaded the Court to carve out a particular *Charter*-free[107] zone of protection from accountability for human rights violations.

In *Auton*, the conceptual errors in reasoning and the subtle pattern of conservatism that typically unfolds in these types of cases i.e. those that engage the rights of the societally disadvantaged, is unsettling. The Supreme Court of Canada unabashedly waded into social policy issues (as it has in the past) and decided *Auton* on social policy grounds while at the same time espousing the opposing view that social policy ought to be sorted out exclusively within the jurisdiction of the democratic process of government.

It is unfortunate that the unfounded fears of the constitutionalisation of health care rights caused the Court such anxiety. This case was just one of many in a long line of *Charter* cases which deserved adjudication regarding *disability* rights on its individual facts and circumstances.

It is not often that the Court 'gets it wrong'. On occasion, the effect of the law can be harsh—judgments of the Court have weighed in on the side of the greater general good in opposition to the compelling needs of a few. However, *Auton* ought not to have been one of those of cases.

A. *The Retreat*

The decision in *Auton* was a devastating blow to the respondent families. Families of individuals living with autism are now compelled to continue expending exorbitant amounts of personal funds to provide ABA/IBI treatment to their children. In doing so, those who can afford to provide the treatment privately amass crippling debt and risk financial ruin. Other children and youth simply do without.

The secondary, collateral impact is disturbing. As ABA/IBI treatment practices have evolved and improved over the decade, the recognition that autistic children and youth respond so successfully to the therapy offers an rejuvenating prospect to these families. This is the treatment that constitutes their child's singular and best opportunity to achieve an individual yet unique personal potential, one that embraces dignity and citizenship to its fullest extent. The financial and emotional strain is such that, in many families, a significant number of otherwise stable adult relationships are rendered vulnerable and exposed to harm.

Contrary to what some might espouse, families are not merely clinging to a vacuous hope of a cure. Hundreds of stories from families who have personally observed the fundamental transformation of their own children and the assessments of professionals form the evidentiary basis for the purpose of legal proceedings. The evidence of the treatment's efficacy and value was gathered over a course of several years by lawyers representing the families in *Auton*, and the most credible and resounding of factual proof was put squarely before the Courts. Ontario

and other provinces have publicly acknowledged its merit and provide ABA/IBI as a social service. The prevailing social and political will appears to strongly support government funding for ABA/IBI treatment, where in need. The result of the judgment has been portrayed as tragic in the eyes of the public, as evidenced by the media coverage following its release.

On 20 December 2004, Ipso-Reid released the results of a survey commissioned by Families for Early Autism Treatment of British Columbia. The poll reported that 84 per cent of Canadians between the ages of 18 and 54 years believed that the provinces should pay for the treatment.[108] Of the approximately 125,000 families (with 150,000 affected children between them) who live with and care for children and youth diagnosed with autism, more than 30,000 petitioned provincial, territorial and federal governments between 2003 and 2004, for public funding of the treatment.[109] At the time the Supreme Court entertained submissions in *Auton* in June, 2004, there were over 180 similar legal actions (approximately 150 in Ontario alone) and involving more than 1600 families proceeding before provincial courts or human rights tribunals. At the time of the Supreme Court of Canada decision release, a class action had been commenced in Ontario.

Since 2002, when the issue attracted national scrutiny, editorial columns and letters to the editor in national, provincially-syndicated and local papers have fed through a steady dose of the plight of families, gracing the front page of newspapers more than once.[110]

In fact, several days before the Supreme Court's decision in *Auton* was released, Canadian national newspaper the *Globe & Mail* had bluntly criticised Ontario's limited IBI program for its' significant deficiencies as unearthed by the Ombudsperson's Office: "After years of ignoring the plight of autistic children, Ontario has at last allotted a sizable amount of money to care for them, but in such an incompetent, inefficient manner that it's tempting to wonder if the province really does care."

Media comments were not restricted to the families – professionals who have a clinical interest in promoting the treatment entered the fray. their views. In 2003, Dr Garry Martin, a professor of psychology at the University of Manitoba who has written extensively in the area of autism told the Winnipeg Free Press:

> ABA/IBI-based therapy has been scientifically proven to give children with autism their best chance to carry on normal, productive lives: virtually all children benefit from it and approximately 50 per cent of children who begin their programs prior to the age of five function normally [sic] after treatment…How better to spend public health dollars than on a program that provides meaningful measurable, lasting benefits—not just for children with autism and their families, but for all Manitobans committed to wise public spending and the preservation of the health care system? [111]

It was no comfort to these families for the highest court in the land to turn them away from the door of opportunity with a meagre offering of sympathy, an expression lacking empathy and a word of advice: turn your attention to the democratic process for the remedy sought. Vote. Lobby members of parliament. The disheartened collective response of British Columbia families is certain to be: "Been there, done that."

The reality is that many of these families have lobbied government with tenacity since 1999, to no avail. Members of Parliament have supported them in the legislature. To these families, the courts were the arbiters of justice and failed them. They are worn and despondent, viewing the political value judgments in which less prominent benefits are routinely provided to others, as fundamentally skewed. In Canada, if you do not live in Alberta, Ontario or Newfoundland (and in those provinces, if your child is over the age of six) your child will not receive any treatment. At minimum, one would have expected the court to admonish the BC government for making a decision that toys with the boundaries of the Constitution, delivering a caution that befits its

role as a supervisory court. Certainly, an *obiter* comment encouraging the government to 'do the right thing' would have eased the fears of the claimants and others similarly situated and pointed the government in the right direction.

B. Solidarity in Difference

In Ontario, the debate continues before the Court of Appeal, the Ontario Human Rights Commission and the Ontario Human Rights Tribunal over the delivery of Ontario's funded ABA/IBI program. In those cases, the issues are whether the delivery of the treatment should be restricted by an arbitrary determination of efficacy or age; and whether the education system should bear responsibility for providing IBI programs as a special education program within schools.

Perhaps, when the Supreme Court has an opportunity to revisit this issue, as it most likely will, the finest legal minds of our nation will have the opportunity and conviction to avoid viewing the issues through the prism of historical jurisprudence and irrational considerations. Perhaps context and purpose will, finally, give real substance to the constitution.

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1 *Auton (Guardian ad litem of)* v *British Columbia (Attorney General)*, [2000] 78 B.C.L.R. (3d) 55, with supplementary reasons (2001), 197 D.L.R. (4th) 165 (B.C.S.C.). [*Auton No. 1*]

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

3 *Auton (Guardian ad litem of)* v. *British Columbia (Attorney General)*, [2004] S.C.J. No. 71. [*Auton*]

4 In Ontario, IBI is currently provided for by the Ontario government through the IEIP program. There are continuing legal disputes before the Superior Court and the Human Rights Tribunal of Ontario about issues of adequate funding, age limits for service and sufficiency of service.

5 On March 4, 2005 (post-*Auton*) Kitely J of the Superior Court of Justice released the decision in *Wynberg et al* v. *The Queen* and *Deskin* v. *The Queen*, two cases that were tried over a period of four months. The issues were whether the government, who operated the ABA/IBI (IEIP) program for 2-5-year-olds, had discriminated against older autistic children on the grounds of age and disability by refusing them any service. The Court defined ABA/IBI as an "intervention" critical to the developmental needs of autistic children. Kitely J declared that Ontario had discriminated against the Plaintiff children, violating their s. 15 *Charter* rights on the basis of age (by restricting the entitlement to the publicly funded ABA/IBI) and on the basis of disability (by failing to provide the intervention at school). The Court ordered the province to pay for the program for all children over six years who required it. Ontario has appealed the decision to the Court of Appeal. As a result of the litigation, there are enormous waiting lists for service.

6 Supra, note 3 at para. 13.

7 Ibid.

8 Ibid., at para. 14.

9 Ibid., at para. 15; also *Auton No. 1*, *supra*, note 1, at para. 25.

10 *Auton (Guardian ad litem of)* v. *British Columbia (Attorney General)* (2002), 173 B.C.A.C. 114, 6 B.C.L.R (4th) 201.["*Auton No. 2*"]

11 Ibid., at para. 49; see also Factum of the Intervener Friends of Children With Autism [FOCA] at paras. 50-51; and Joint Factum of the Interveners Women's Legal Education and Action Fund [LEAF] and Disabled Women's Network Canada [DWNC], at para. 27; and Factum of the Interveners Canadian Association of Community Living [CACL] and Council of Canadians With Disabilities [CCWD], at para. 23 and 47.

12 Ibid., at para. 50.

13 Ibid., at para. 51.

14 Ibid.

15 Ibid.

16 Supra, note 3, at para. 2.

17 Ibid.

18 *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497.

19 Canada Health Act, R.S.C. 1985, c. C-6.

20 Medicare Protection Act, RSBC 1996, c. 286; and Medical and Health Care Services Regulation, B.C. Reg. 426/97, ss. 17-29.

21 Supra, note 3, at para. 35.

22 Ibid., at para. 41.

23 Ibid., at paras. 1 and 41.

24 Ibid., at para. 44.

25 Supra, note 2, s. 15(1).

26 Supra, note 3, at para. 28.

27 Ibid., at paras. 29 and 30.

28 Ibid., at para. 46.

29 Ibid., at paras. 30, 35, 39 and 41.

30 Ibid., at paras. 48 and 57.

31 Supra, note 1, at para.129.

32 Supra, note 3, at paras. 58.

33 Ibid., at paras. 59-62.

34 Ibid., at paras 58-59.

35 Joint Factum of the AG (BC) and the Medical Services Commission (BC), at paras. 59-60.

36 Ibid, at para. 52.

37 Ibid.

38 Ibid., at para. 68.

39 Ibid., at para. 80.

40 Ibid.

41 Ibid., at paras. 116-117.

42 Pottie, L. and Sossin, L. (2005) 'Demystifying the Boundaries of Public Law: Policy, Discretion and Social Welfare', 38 UBC L.Rev. 147. According to the authors at pg. 2, 'soft law' describes

the "guidelines, directives, and other informal instruments that influence discretionary decision-making."

43 Factum of the Attorney General of Ontario, at para. 39.

44 Ibid., at para. 54.

45 *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 SCR 624, in which the deaf claimants sought and obtained a declaration that the B.C. government's refusal to fund sign interpreters for them violated their s. 15(1) *Charter* rights because the lack of interpretation services prevented them from accessing public health care.

46 Supra, note 43 at para. 40.

47 Ibid., at paras. 41 and 44.

48 Ibid., at para. 47.

49 Ibid., at para. 49. See Greschner, D. and Lewis, S., '*Auton* and Evidence-Based Decision-Making: Medicine in the Courts', (2003) 82 *Can. Bar Rev*. 501.

50 Grant, I. And Mosoff, J., 'Hearing Claims of Inequality: *Eldridge* v. *British Columbia (AG)*', (1998) 10 Canadian Journal on Women and the Law 229.

51 *Eaton* v. *Brant County Board of Education* (1997), 142 DLR (4th) 385 (SCC).

52 Supra, note 50 at 231.

53 Ibid.

54 Ibid. at 233.

55 Supra, note 45 at 406.

56 Supra, note 50 at 233.

57 Ibid.

58 Ibid, at 235.

59 Ibid., at 236.

60 Ibid., at 234.

61 Ibid.

62 Ibid.

63 Joint Factum of LEAF and DAWN, at para.6.

64 Ibid, at paras. 49-50.

65 Pottie, L. and Sossin, L. (2005) 'Demystifying the Boundaries of Public Law: Policy, Discretion and Social Welfare', 38 U.B.C. L.Rev. 147. Also cited at note 42.

66 Ibid, at para. 81.

67 Ibid, at para.23.

68 Ibid, at para. 39.

69 Ibid.

70 Ibid.

71 Ibid., at para. 43.

73 Supra, note 45 at para. 21.

74 Supra, note 65 para. 48.

75 Ibid. at para. 45. See *New Brunswick (Minister of Health and Community Services)* v. *GJ*, [1999] 3 S.C.R. 46 at 102, which the Law Society of New Brunswick's policy to deny legal aid funding to parents subject to state custody applications was challenged.

76 Ibid., at para.50.

77 *Falkiner* v. *Ontario*, [2002] OJ No. 1771 (CA).

78 Supra, note 65, at para. 66. Also see *Nieberg* (*Litigation Guardian of*) v. *Ontario*, [2004] OJ No. 1135 for a pronouncement of the Ontario Div. Ct. on procedural fairness and the sufficiency of reasons in the social welfare context.

79 Supra, note 10 at para. 112.

80 Ibid.

81 Ibid.

82 [1987] 1 S.C.R. 1114 at para. 34, referring to the *Abella Report*.

83 Ibid.

84 Chadna, E. and Schatz, L. (2004) 'Human Dignity and Economic Integrity for Persons With Disabilities: A Commentary on the Supreme Court's Decisions in *Granovsky* and *Martin*', 19 *Journal of Law and Social Policy* 94, p97.

85 Ibid. p98.

86 Ibid.

87 Ibid. pp. 98-99.

88 Supra, note 1 at para. 53.

89 Supra, note 45.

90 Supra, note 18 at paras. 51 and 53.

91 Supra, note 10 at paras 135 and 136.

92 Supra, note 43.

93 Young, M. (1997)'Sameness/Difference: A Tale of Two Girls', 4 *Review of Constitutional Studies* 150, p165.

94 Supra, note 50 p232.

95 Supra, note 10 at para. 46.

96 Ibid., at para. 48.

97 Ibid., at para. 49.

98 Supra, note 1 at para. 126.

99 Porter, B. (1998) 'Beyond Andrews: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend*', 9:3 *Constitutional Forum* 71, p73.

100 Ibid., p74.

101 Ibid., p75.

102 Ibid.

103 Ibid., p76.

104 Ibid., pp. 77-78.

105 Ibid., p78.

106 Ibid., p72.

107 Supra, note 3, at paras. 40-41.

108 "*Charter*-free zone" is respectfully attributed to Mary Eberts, of Eberts, Symes, Pinto and Jull, in FOCA's oral submissions to the court.

109 See Ipso-Reid Corporation website at www.ipsos-na.com/news/pressrelease.cfm?id=2505.

110 See website for the Autism Society of Canada at www.autismsociety.ca; see also "Reid Speaks Out for Autistic Kids" at www.scottreid.ca/archive_2003.html

111 See www.asotoronto.org/ARTICLES2%20L85.xls.

112 The *Winnipeg Free Press*, Focus, 'Autism therapy offers chance', 10 April 2003 at www.mfeat.ca/info/ABA/IBI/vision%20school%20ABA/IBI.html.

Race, Poverty, Justice and Katrina: Reflections on Public Interest Law and Litigation in the United States

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I. Summary

In the wake of the Katrina catastrophe, New Orleans and other parts of the Gulf Coast region in the United States must be rebuilt in a sustainable and socially just way. It will cost well over $200 billion to rebuild the region. Low-income people of colour disproportionately bear the burdens of the Katrina disaster, and disproportionately stand to lose out on the benefits of recovery and relief.

The people who lived in the areas of New Orleans that were still flooded days after Hurricane Katrina struck were more likely to be black, have more children, earn less money, and be less educated than those in the rest of the city.

Normal federal contracting rules are largely suspended in the rush to help people displaced by the storm and reopen New Orleans and the Gulf Coast. Hundreds of millions of dollars in no-bid contracts have already been let and billions more are to flow to the private sector in the weeks and months to come. The administration of President George W. Bush has waived the federal law requiring that prevailing wages be paid on construction projects underwritten by federal dollars. The administration has suspended the requirement that new federal contractors have an affirmative action plan to hire people of colour, women, veterans, and disabled people on Katrina-related projects to ensure that they receive their fair share of the billions of dollars for reconstruction.

Katrina and the demographics of destruction and reconstruction illustrate that race, poverty, and inequality are the most intractable problems in the history of the United States. "I hope we realize that the people of New Orleans weren't just abandoned during the hurricane," Senator Barack Obama, the only Black person in the United States Senate, said in the days after the Katrina catastrophe. "They were abandoned long ago – to murder and mayhem in the streets, to substandard schools, to dilapidated housing, to inadequate health care, to a pervasive sense of hopelessness."[2]

The purpose of the Dublin conference is to examine the role that public interest law and litigation might have in advancing the position of disadvantaged and vulnerable groups in Irish society; to identify barriers to this role; and to explore options for a development strategy. The systemically vulnerable groups in Ireland's booming economy include children, the disabled, the homeless, single parents, migrants, seniors, ex-offenders, refugees and those seeking asylum, Travellers and Romas, and the unemployed.[3]

The most systemically disadvantaged and vulnerable people in the United States are low income people of colour. What role does public interest law and litigation have in advancing their position in the United States? What are the implications for public interest law and litigation in Ireland?

This paper will consider *Brown v Board of Education* as the paradigm example of public interest litigation in the United States in the 20th Century. The United States Supreme Court in *Brown* in 1954 took a giant step to abolish legal apartheid across the country by striking down the doctrine of "separate but equal" in public elementary schools that segregated school children on the basis of race. The *Brown* Court held that separate is inherently unequal and violates equal protection under the Constitution of the United States. Today, however, many public

schools across the country are more segregated than before *Brown* was decided. The litigation model with a primary emphasis on establishing a binding precedent in court to accomplish social change through law is no longer the paradigm for public interest law in the United States in the 21st Century. It is increasingly challenging to win public interest cases in federal courts, and to win fee awards even in successful cases. Efforts for reform increasingly focus on diverse state, regional, and local as well as federal strategies as a result of "devolution."

This paper will then consider efforts to evolve public interest law and litigation in the face of an increasingly conservative country, Congress, and court system. This paper will reflect on efforts in Southern California to achieve equal access to public resources while promoting democratic values of full information and full and fair public participation in the decision making process. Specifically, the focus will be on the struggles for equal access to schools, parks, health, and transportation. These are examples of using public interest law with and without litigation to make concrete improvements in people's lives, give people a real sense of their own power, and alter the relations of power. The key strategies include developing a collective vision to bring people together, coalition building and community organizing, multidisciplinary research and analyses, policy and legal advocacy outside the courts, strategic media campaigns, creative engagement of opponents to find common ground, and impact litigation when necessary within the context of a broader campaign.

This paper will then return to Katrina, destruction and reconstruction, before reaching the conclusion.

II *Brown v Board of Education* and Public Interest Litigation in the 20th Century

Brown v Board of Education can be viewed as the paradigm example of public interest litigation in the United States in the 20th Century. The United States Supreme Court in 1954 struck down the doctrine of 'separate but equal' in public elementary schools that, by law, segregated school children on the basis of race. The *Brown* Court held that separate is inherently unequal and violates equal protection. The NAACP Legal Defense & Education Fund, Inc., litigated that case and established the paradigm for public interest litigation in the 20th century.[4] In the litigation paradigm, attorneys strategically found sympathetic plaintiffs, developed the facts and evidence, filed a lawsuit and took it all the way up to the United States Supreme Court in an effort to establish the law of the land that would impact every state and city in the nation. Decades of enforcement actions in court followed to ensure that the law was applied.

Without a doubt, *Brown* was a victory that needed to be won. The symbolism of abolishing legal apartheid in education and throughout society remains an overwhelmingly important accomplishment.[5] The decision in *Brown* was a key victory in the modern civil rights movement and paved the way to equal access to schools, jobs, housing, public accommodations, and to the Civil Rights Act of 1964. It is also important to keep in mind that the *Brown* litigation was in fact only part of a long-term strategic campaign to abolish legally sanctioned segregation.[6]

Other public interest law groups applied the litigation model in other contexts, and even lifted the name of the Legal Defense Fund for their own work — for example, the Mexican American Legal Defense & Education Fund, the Sierra Club Legal Defense Fund, and the NOW (National Organization for Women) Legal Defense Fund.

Today, however, many public schools across the country are more segregated than before *Brown*.[7] African-American and Latino children suffer in segregated inner-city schools, short-changed by 'white flight' to suburbs and private schools, restrictive legal rulings, inequities in school funding, low academic expectations, and pervasive neglect. Non-Hispanic White children in suburban or private schools are being prepared to think creatively, to reason, to

lead; children of colour to provide a compliant workforce capable of following orders. This dilemma exists in much of urban America, where schools are segregated not by law but because neighbourhoods are segregated.

What are the lessons of *Brown* and segregation in education today for public interest law and litigation in Ireland? Civil rights advocates in the United States are reassessing the litigation paradigm and developing more robust strategies in their practices, in conferences, and in works like *Awakening from the Dream: Pursuing Civil Rights in a Conservative Era,* edited by Denise C. Morgan and others (2005).[8] One lesson is already clear. The litigation model with a primary emphasis on establishing a binding precedent in court to accomplish social change through law across the country is not the paradigm for public interest law in the United States for the 21st Century. It is increasingly challenging to win public interest cases in federal courts and to win fee awards even in successful cases.[9] Efforts for reform increasingly focus on diverse state, regional, and local as well as federal strategies as a result of the 'devolution' of power from the federal government.

III Reflections from Los Angeles

This section will consider efforts to evolve public interest law and litigation in the United States in the face of an increasingly conservative country, Congress, and courts. Specifically, this section will consider the struggles for equal access to schools, parks, health and transportation in Los Angeles. Urban issues like schools, parks, health, and transportation are genuine civil rights issues of race, poverty, and democracy that are interrelated in the United States economy. We are implementing a collective vision for Los Angeles with lessons for other regions: a comprehensive and coherent web of parks, schools, and transportation that promotes human health and economic vitality and reflects the diverse cultural urban landscape. This is part of a broader vision for distributing the benefits and burdens of public resources in ways that are equitable, protect human health and the environment, promote economic vitality and engage informed public participation in the decision-making process. Key strategies include developing a collective vision to bring people together, coalition building and community organising, multidisciplinary research and analyses, policy and legal advocacy outside the courts, strategic media campaigns, creative engagement of opponents to find common ground and impact litigation when necessary within the context of a broader campaign.

We are building a different model of urban development that focuses on children, families, health, parks, schools and transportation. Nowhere else in the United States is there such a convergence of institutions, grassroots activists, business interests and people of colour in positions of power. There is no better place in the United States to do this than Los Angeles. Los Angeles is a laboratory for progressive change that reverberates throughout the country.

A Schools, Jobs, and Contracts in Los Angeles

The Los Angeles Unified School District is investing $14.4 billion to build new schools and modernise existing schools. This might be the largest investment in schools in one place and time ever. New schools are being built, older schools are becoming less crowded, and hundreds of acres of land are being environmentally restored. More than $9.2 billion will be invested on 184 new schools and additions, which will add over 6,500 classrooms, over 171,000 seats, and over 450 acres of playing fields and play areas. School yards will provide places to play after school and on weekends. More importantly, the future has become brighter for hundreds of thousands of children. And it is being done in a manner that respects the public's demand for accountability, transparency, and social justice. This massive public works project involves issues that lie at the intersection of education, racial justice, jobs and economic vitality, and sustainable regional planning.

Aside from the educational benefits, new construction and modernisation will create local jobs for local workers and stimulate the Los Angeles economy. The school construction program will

create 174,000 jobs, $9 billion in wages, and $900 million in local and state taxes. The School District has targeted small businesses and local workers to ensure they receive a fair share of these benefits. The School District adopted a 25% Small Business Enterprise goal in 2003. For the 2004 fiscal year, 39% of all contract awards – $337 million – went to Small Business Enterprises, with the percentages increasing each quarter to 62% in April-June. Small Business Enterprise participation in Construction Management and similar contracts exceeded 40% in Fiscal Year 2004. The School District has set the goal of 50% local worker participation for school construction. To achieve this goal, the School District provides ten-week pre-apprenticeship training, and facilitates placement in union apprenticeship training programs. Local workers are disproportionately people of colour and low income people. Small businesses are disproportionately owned or managed by people of colour, women, and veterans.

In the Los Angeles Unified School District, 91% of the students are children of colour. Half the system's 700 schools have few or no White students. Nearly 1 million Black and Latino students attend California schools with few if any Whites.

The school construction and modernisation program in Los Angeles is an example of public interest lawyers seeking improvements in public education through legal and policy advocacy outside the courts, rather than litigation. I served as the Chair of the School District's Independent School Bond Oversight Committee for five years from 2000 to 2005 to oversee school construction and modernisation. I signed the official ballot arguments for two successful local bond measures which provided over $7 billion for school construction and modernisation, with billions more in matching state and federal funds. The School District implemented the programmes for local jobs and small businesses in response to the recommendations of the Oversight Committee. Another civil rights attorney and I both decided to devote substantial time and resources to service on the Committee as the result of a strategic decision to improve public education without litigation.

Challenges remain for public schools in Los Angeles. Drop-out rates of over 50% are unacceptably high. Performance on standardised academic tests is improving but remains far behind where it should be. Fully 87% of students in the School District are not physically fit because of obesity, inactivity and the lack of places to play in school yards and parks.[10]

B The Urban Park Movement

The urban park movement is relying on diverse strategies that have implications for public interest law and litigation to serve disadvantaged and vulnerable groups.[11] One of the broadest and most diverse alliances ever behind any issue in Los Angeles has joined together to create parks in underserved communities of colour. Many parts of Los Angeles are park-poor and there are unfair disparities in access to parks and recreation based on race, ethnicity, income and access to transportation. Children of colour living in poverty with no access to cars have the worst access to parks and recreation. In a cruel irony, disproportionately white and wealthy people with fewer children than the county average enjoy the most access to parks and recreation. The people who need parks the most have the least, while those who need less have the most. The parks and recreation system in Los Angeles is separate and unequal.

The urban park alliance created a state park in the 32-acre Chinatown Cornfield in the last vast open space in downtown Los Angeles. The alliance stopped a proposal for a massive warehouse project there without an environmental impact report by the city and a wealthy developer seeking federal urban renewal subsidies to make the deal profitable. The alliance challenged the proposed warehouses as one more product of discriminatory land use policies that long deprived communities of colour of parks and recreation. The alliance through an administrative complaint persuaded the United States Secretary of Housing and Urban Development to withold any subsidies for the warehouses unless there was a full environmental review which considered the park alternative and the impacts on people of colour. The alliance then persuaded the state to buy the site for the new Los Angeles State

Historic Park. The Cornfield is "a heroic monument" and "a symbol of hope," according to the Los Angeles Times.

The alliance separately persuaded the state to buy a former railyard at Taylor Yards to create a 40-acre park on the banks of the Los Angeles River as as part of the greening of the 51-mile River, the most environmentally degraded river in the world. The urban park alliance won an environmental law suit against the city and another developer to stop a commercial project there. The alliance organised the community to stop a power plant and a garbage dump in favour of a two square mile park in the Baldwin Hills, the historic heart of African-American Los Angeles, which will be the largest urban park in the United States in over a century – bigger than Central Park in New York City or Golden Gate Park in San Francisco. The alliance persuaded the state and the city of Los Angeles to form a partnership to create the next great urban park on a 100-acre site in Ascot Hills in Latino East Los Angeles. Until now the largest open space in East Los Angeles has been Evergreen Cemetery, which sends a message to children that if they want open space, they have to die first.

Parks are important in themselves. Parks are also an important organising tool to bring people together to create the kind of community where they want to live and raise children. Emphasising the diverse values at stake is a core strategy of the urban park movement to build support for parks and recreation. The values at stake include providing children the simple joys of playing in the park; improving human health and recreation; ensuring equal access to public resources; and providing the clean air, water and ground benefits of safe and healthy urban parks and green schools.

The Center for Law in the Public Interest recently received the Los Angeles River Award from the City of Los Angeles "for extensively publishing research and findings on urban parks and their benefits for the River, for receiving national recognition in your efforts to revitalize the River, and for your contribution to the greening of the River through your work on the Cornfields and Taylor Yard state parks."

C Transportation Justice: *MTA* and its Aftermath

Civil rights attorneys working with grassroots activists won the landmark environmental justice class action *Labor/Community Strategy Center v Los Angeles County Metropolitan Transportation Authority (MTA)*. The plaintiff class alleged that MTA operated separate and unequal bus and rail systems that discriminated against bus riders who were disproportionately low income people of color. The parties settled the case after two years of litigation and mediation through a court-ordered Consent Decree in which MTA agreed to invest over $2 billion in the bus system, making it the largest civil rights settlement ever. MTA agreed to improve transportation for all the people of Los Angeles by reducing overcrowding on buses, lowering transit fares and enhancing county-wide mobility. The plight of the working poor with limited or no access to cars illustrates the need to implement a transportation policy agenda to provide choices to people who currently lack them.

The MTA case is a prime example of how a highly organised grassroots campaign can team up with creative civil rights lawyers, academics and other experts to achieve social change. Together, the participants collected and analysed the data, organised the community, made political connections, presented the case to the media and won the groundbreaking lawsuit that is helping to bring transportation equity to Los Angeles. The case has received national and international attention and has led to similar efforts in other cities.[12]

The MTA case enabled the plaintiff class to present a well-documented story about MTA's pattern and history of unfair, inefficient, and environmentally destructive allocation of resources. The legal team documented the unfair disparities in a massive 226 page brief filed in court in support of the settlement. The evidence was largely undisputed and is summarised below.

1 ***Racial disparities.*** While over 80% of the people riding MTA's bus and rail lines were people of colour, most people of colour rode only buses. On the other hand, only 28% of riders on Metrolink were people of colour. Metrolink is the six-county Southern California commuter rail line, which MTA has provided with over 60% of the local subsidy funding. The percentage of people of colour riding Metrolink varied by 173 standard deviations from the expected 80%. The likelihood that such a substantial departure from the expected value would occur by chance is infinitesimal, according to expert testimony for the plaintiff class.[13]

2 ***Subsidy disparities.*** While 94% of MTA's riders rode buses, MTA customarily spent 60-70% of its budget on rail. Data in 1992 revealed a $1.17 subsidy per boarding for an MTA bus rider. The subsidy for a Metrolink commuter rail rider was 18 times higher, however, or $21.02. For a suburban light-rail streetcar passenger, the subsidy was more than nine times higher, or $11.34; and for a subway passenger, it was projected to be two-and-a-half times higher, or $2.92. For three years during the mid-1980s, MTA reduced the bus fare from $0.85 to $0.50. Ridership increased 40% during the period, making this the most successful mass transit experiment in the post-war era. Despite this increase in demand, MTA subsequently raised bus fares and reduced its peak-hour bus fleet from 2,200 to 1,750 buses.

3 ***Security disparities.*** While MTA spent only $0.03 for the security of each bus passenger in fiscal year 1993, it spent 43 times as much, or $1.29, for the security of each passenger on the Metrolink commuter rail and the light rail, and 19 times as much, or $0.57, for each passenger on the Red Line subway.

4 ***Crowding disparities.*** MTA customarily ran overcrowded buses with 145% of seated capacity during peak periods. In contrast, there was no overcrowding for riders on Metrolink and MTA-operated rail lines. Metrolink was operated to have three passengers for every four seats so that passengers could ride comfortably and use the empty seat for their briefcases or laptop computers.

5 ***The history and pattern of discrimination.*** Such disparate treatment has devastating social consequences. The Governor's Commission on the 1964 Los Angeles riots and rebellion found that transportation agencies "handicapped minority residents in seeking and holding jobs, attending schools, shopping, and fulfilling other needs," and that the inadequate and prohibitively expensive bus service contributed to the isolation that led to the civil unrest in Watts.[14] Thirty years later, following the riots and rebellion in the wake of the acquittals of the police officers in the Rodney King beating, MTA commissioned a new study on inner city transit needs that echoed the recommendations of the Governor's Commission. MTA, however, did not comply with the recommendations of either report.

6 ***Efficiency and Equity Prevail.*** Buying more buses under the Consent Decree reflects sound transportation policy to offset decades of overspending by MTA on rail and unproductive road projects. MTA's policies have focused on attracting automobile users onto buses and trains, to the detriment of the transit dependent who are MTA's steadiest customers. The dissonance between the quality of service provided to those who depend on buses and the level of public resources being spent to attract new transit riders is both economically inefficient and socially inequitable. Policies to attract affluent new riders decrease both equity and efficiency because low-income riders are, on average, less costly to serve. The poor require lower subsidies per rider than wealthier patrons. Moreover, the loss of existing ridership brought about by increased fares and the reduced quality of bus service, as in Los Angeles, far exceeds the small number of new riders brought onto the system.

The plaintiff class maintained that this evidence established both (1) intentional discrimination, and (2) unjustified discriminatory impacts for which there were less discriminatory alternatives.

It is important to discuss the legal basis for the MTA *case and subsequent developments below. A federal statute known as Title VI of the Civil Rights Act of 1964 prohibits intentional discrimination based on race and ethnicity by recipients of federal funds such as MTA. The regulations passed by federal agencies to implement the Title VI statute also prohibit unjustified discriminatory impacts against people of colour. The discriminatory impact regulations do not require proof of the intent to discriminate. The plaintiff class relied on both standards to prevail in the* MTA *case.*

After the parties settled the case in 1996, the United States Supreme Court held in an unrelated case in Alexander v Sandoval *that individuals and groups do not have standing to enforce the regulations that prohibit discriminatory impact without proof of intent. The MTA case as filed and won could not be filed today as a result of that Supreme Court ruling. This in itself has significant implications for public interest law and litigation to serve disadvantaged and vulnerable groups, as discussed below.*

D Equal Justice after Sandoval

A conservative 5-4 majority of the United States Supreme Court in *Alexander v Sandoval*[15] took a step to close the courthouse door to individuals and community organisations challenging practices that adversely and unjustifiably impact people of colour, such as unequal access to schools, parks, and transportation. The majority held there is no standing for private individuals like José Citizen or groups like the Labor Community Strategy Center (in the *MTA* case) to file suit to enforce the discriminatory *impact* regulations issued by federal agencies under Title VI of the Civil Rights Act of 1964. Those are the regulations that the plaintiff class successfully relied on in part to win the *MTA* case. This is one of the ways that the United States Supreme Court is rolling back civil rights protections, by manipulating legal doctrines like standing to sue.

Although the *Sandoval* holding is a serious blow to civil rights enforcement, it is more important to keep in mind that intentional discrimination and unjustified discriminatory impacts are just as unlawful after *Sandoval* as before and that recipients of federal funds like MTA remain obligated to prohibit both. Even now, after *Sandoval*, individuals still can sue a recipient of federal funds to challenge intentionally discriminatory practices. Known discriminatory impact continues to be among the most important evidence leading to a finding of discriminatory intent.

Aside from private lawsuits in federal court, there remain other ways to enforce discriminatory impact regulations. Recipients of federal funds are still bound by the regulations under Title VI and every recipient signs a contract to enforce Title VI and its regulations as a condition of receiving federal funds. This provides an important opportunity to use the planning and administrative processes to resolve discriminatory impact issues. Similar kinds of evidence are relevant to prove both discriminatory intent and discriminatory impact. The same kinds of evidence can also be as persuasive in the planning process, administrative arena and court of public opinion, as in a court of law. The urban park alliance did just that, using evidence of both intentional and disparate impact discrimination administratively to persuade the Secretary of the United States Department of Housing and Urban Development to cut off federal subsidies for warehouses in the Cornfield.

There are important strategic considerations in the quest for equal justice after *Sandoval*. Elected officials should be increasingly sensitive to and held accountable for the impact of their actions on communities of colour, especially now that people of colour are in the majority in 48 out of the 100 largest cities in the United States. People of colour are increasingly being elected to positions of power or otherwise holding decision-making authority at the local and

state levels, as well as at the federal level. Los Angeles, for example, recently elected its first Latino mayor in 130 years. Ballot measures like the billions of dollars in school bond measures in Los Angeles can be crafted and invested to provide resources for underserved communities. State civil rights protections can be enforced and strengthened. California, for example, now has a state statute that prohibits both intentional discrimination and unjustified discriminatory impacts based on race and ethnicity by recipients of state funds. The United States Congress can and should pass legislation to reinstate the private cause of action to enforce the discriminatory impact standard. Civil rights claims can be creatively combined with other laws in future cases in the wake of *Sandoval* to use the strengths of one body of law to shore up weaknesses in another. The urban park movement has combined claims under civil rights and environmental laws, for example, to argue that environmental impact reports must analyse and disclose the impacts on communities of colour.

The complexities of equal justice after *Sandoval* require far-reaching strategies that include building multicultural alliances, legislative and political advocacy, strategic media campaigns, research and analyses of financial, demographic, and historical data and strengthening democratic involvement in the public decision-making process in addition to litigation. Societal structures and patterns and practices of discrimination are significant causes of racial injustice and should be principal targets of reform.

IV Katrina, Destruction, and Reconstruction [16]

A The Challenge

In the wake of Hurricane Katrina, New Orleans and other parts of the Gulf Coast region need to be rebuilt in a sustainable and socially just way. It will cost well over $200 billion in federal funds to rebuild the region. People of colour and low-income communities disproportionately bear the burdens of the Katrina disaster and disproportionately stand to lose out on the benefits of recovery and relief. The people who lived in the areas of New Orleans that were still flooded days after Hurricane Katrina struck were more likely to be black, have more children, earn less money, and be less educated than those in the rest of the city (see demographic analyses and map in the appendix).

Normal federal contracting rules are largely suspended in the rush to help people displaced by the storm and reopen New Orleans and the Gulf Coast. The administration has suspended the requirement that new federal contractors have an affirmative action plan to hire people of colour, women, veterans and disabled people on Katrina-related projects to ensure that they receive their fair share of the billions of dollars for reconstruction. The waiver of the affirmative action rule has been extraordinarily rare: there have been only four in the forty years for which the law has been on the books, and each was for a single, highly-specialised short-term contract, including two in the 1980s for federally financed work on commemorative coins.[17]

The private sector is poised to reap a windfall of business in the largest domestic rebuilding effort ever undertaken. Hundreds of millions of dollars in no-bid contracts have already been let and billions more are to flow to the private sector in the weeks and months to come.[18] The administration has waived the federal law requiring that prevailing wages be paid on construction projects underwritten by federal dollars.[19] Some experts warn that the crisis atmosphere and the open federal purse are a bonanza for lobbyists and private companies and are likely to lead to the contract abuses, cronyism and waste that numerous investigations have uncovered in post-war Iraq.[20]

Lawmakers and industry groups are lining up to bring home their share of the cascade of money for rebuilding and relief. Louisiana lawmakers plan to push for billions of dollars to upgrade the levees around New Orleans, rebuild highways, lure back business and shore up the city's sinking foundation. The devastated areas of Mississippi and Alabama will need similar

infusions of cash. Communities will want compensation for taking in evacuees. Future costs of healthcare, debris removal, temporary housing, clothing and vehicle replacement will add up.[21]

Other ideas circulating through Congress that could entail significant costs include turning New Orleans and other cities affected by the storm into big new tax-free zones; providing reconstruction money for tens of thousands of homeowners and small businesses that did not have federal flood insurance on their houses or buildings; and making most hurricane victims eligible for health care under Medicaid and having the federal government pay the full cost rather than the current practice of splitting costs with states.[22]

The relief money is not expected to cover any of the real reconstruction costs that lie ahead: repair of highways, bridges and other infrastructure and new projects that seek to prevent a repeat of the New Orleans disaster. Nor will it help pay for expanded availability of food stamps and poverty programmes to cover hurricane victims. Farmers from the Midwest, meanwhile, are beginning to press for emergency relief as a result of their difficulties in shipping grain through the Port of New Orleans.[23]

One of the most immediate tasks after Hurricane Katrina hit was repair of the breaches in the New Orleans levees. Three companies have been awarded no-bid contracts by the Army Corps of Engineers to perform the restoration. To provide immediate housing in the region, FEMA says it suspended normal bidding rules in awarding contracts.[24]

B. Building a Better Future

Drawing on the lessons of public interest law and litigation discussed above, the following steps can and should be taken to restore New Orleans and the Gulf Coast region in a socially just way.

1 Jobs and Contracts

People of colour on the Gulf Coast devastated by the Katrina disaster should receive their fair share of the economic benefits of recovery through local jobs for local workers, and an even playing field for small business enterprises that include people of color and women in positions of ownership and management. The jobs and small business programs of the Los Angeles Unified School District are a best practice example for the Gulf Coast and other public works projects.

2 Sustainable Flood Control, Levees, and Wetlands

The natural ecosystem along the Gulf has been stripped of natural buffers like coastal reefs, tropical forests and swampland that can absorb rising water and resist tidal surges. The levees in New Orleans need to be restored and strengthened for flood control purposes, but flood control cannot be the only purpose dictating the design of the levees and surrounding wetlands. Levees and wetlands should be restored in a sustainable, environmentally sound manner that serves people's needs for safe and healthy open space for parks, recreation and habitat restoration, clean air and clean water. Every few square miles of marshes lower the flood level significantly.

In the 1930s the Army Corps of Engineers drowned the 51-mile Los Angeles River in concrete for flood control purposes. The problem was defined as flood control and the solution addressed only the problem as defined. As a result, the Los Angeles River is the most environmentally degraded river in the world. Today Los Angeles is beginning to green the river with parks, habitat restoration, housing, schools and economic development recognised as central components of any river restoration and flood control effort. The greening of the Los Angeles River provides valuable lessons for restoring the levees in a sustainable way that takes into account the diverse values at stake, not just the need for flood control.

The Environmental Law Institute cited the green school construction and modernisation programme in Los Angeles as a national "best practice" example for sustainable construction with natural lighting, trees and grass and renewable energy meeting CHPS (Collaborative for High Performance School) and LEEDS (leadership in energy and environmental design) standards. Sustainable construction standards should be set and followed for new and restored buildings in the Gulf Coast.

3 Transportation Justice

Fully one-quarter of the people in New Orleans did not own cars or have ready transportation out of town in the event of evacuation orders. Civic leaders knew that many of the city's poor, including 134,000 without cars, could be left behind in a killer storm.[25] Many who had cars before will not be able to repair or replace cars damaged or destroyed by the flood. The plight of the working poor with limited or no access to cars illustrates the need to implement a transportation policy agenda to provide choices to people who currently lack them.

An evacuation plan for low income people must be developed and implemented with local people on the planning team to ensure full and fair public participation. Effective communication with local people is essential. The very low car ownership rates of African-Americans in New Orleans and other Gulf Coast areas need to be addressed. More public transportation alone will not be enough in an evacuation. Public transit is one of the first parts of infrastructure to cease operation or fail in an emergency. Car ownership, maintenance and insurance should be funded through micro-loans. Neighbourhood car repair businesses can be funded through disadvantaged business enterprise programs. The monopoly on taxi cab ownership and operation should be ended. Jitneys (multi-unassociated riders) should be permitted. Increased car ownership is one answer, but traditional environmentalists are often not comfortable with this.

4 Oversight, Information, and Public Participation

An independent citizens' oversight body of progressive individuals should be created and funded to find out what went wrong and why in New Orleans and the Gulf Coast region, and how to create a better future, to serve as a check and balance for any official commissions and studies. It is necessary to offer a counter-narrative because the government cannot be trusted to do it alone. Democratic values of full disclosure of information and public participation need to be implemented.

The oversight body can gather, analyse and publish the information necessary to understand the impact of Katrina and the rebuilding efforts on all communities, including communities of colour and low-income communities.

It is necessary to conduct multidisciplinary research and analysis to find out what went wrong and why, and how the future could be better.

i Follow the money. Who benefits from reconstruction, and who gets left behind?

ii Demographic analysis. The people who lived in the areas of New Orleans that were still flooded days after Hurricane Katrina struck were more likely to be black, have more children, earn less money, and be less educated than those in the rest of the city.[26] Additional demographic analyses using census data and GIS (geographic information systems) need to be conducted along the Gulf Coast to understand the impacts of destruction and reconstruction based on race, ethnicity, income, poverty, education, gender, access to cars and other salient factors.

iii Historical research to understand how the region came to be the way it is and how it could be better. Secretary of State Condoleeza Rice has recognised that the Katrina disaster "gives us an opportunity" to rectify historic injustices in the South. "When it's rebuilt, it should be rebuilt in a different way than it was at the time this happened," she said, adding that "maybe now on the heels of New Orleans" there could be an effort to "deal with the problem of persistent poverty."[27]

iv Creative legal research and analysis needs to combine civil rights, environmental, housing, employment and other areas to bolster the weaknesses of one body of law with the strengths of another.

5 Congressional Caucuses Working Together

The Black, Hispanic, and Asian Pacific American Congressional Caucuses should begin to work together immediately to address sustainable and socially just rebuilding and relief efforts. Black people in New Orleans suffered disproportionately from the Katrina destruction. 145,000 Latinos have been left without jobs in the Gulf Coast. Many Latinos in rural areas did not have adequate access to information, do not speak English, are undocumented, and are quite alone in the recovery. The needs of Asian-American small entrepreneurs in the fishing industry on the Gulf Coast need to be addressed.

6 The Unique Culture and Heritage of New Orleans

New Orleans celebrates even in death through jazz music in funeral processions. This joyous spirit should guide the reconstruction of New Orleans and the Gulf Coast. One of the reasons New Orleans is dear to the hearts of people everywhere is the rich artistic and cultural heritage of the area, as expressed in art, music, food, and cultural celebrations. Mardi Gras in February 2006 and the New Orleans Jazz and Heritage Festival in the spring of 2006 will provide opportunities to mourn destruction and celebrate reconstruction together, with tourism helping to bring economic recovery for all. Reconstruction should preserve the rich cultural heritage of New Orleans through preservation and adaptive reuse of historic buildings and neighbourhoods. Reconstruction must respect the diversity of the Native American, Spanish, French, African-American, Creole, Cajun, and other people who have given New Orleans its unique power of place. Reconstruction must preserve and build on the strengths of New Orleans and its character as a compact, walkable, historic community. Reconstruction should also avoid the mistakes of the past and prevent concentrated poverty in some areas.

7 Never Again

In a video guide to hurricane evacuations that had been prepared for but not yet distributed in New Orleans before Katrina struck, the Rev Marshall Truehill warned "Don't wait for the city, don't wait for the state, don't wait for the Red Cross." The central message to the people of New Orleans was blunt: Save yourself, and help your neighbours if you can.[28]

We can and must do better than that by turning to each other and effective government to achieve equal justice, democracy, and livability for all. That is true in New Orleans, along the Gulf Coast, and across the nation. With all due respect, that can be understood as a central lesson for public interest law and litigation in Ireland as well.

V Conclusion

Mel Cousins' report on public interest law and litigation in Ireland concludes that public interest litigation works best when it is part of a broader public interest law approach that includes law reform, legal education, and community engagement.[29] We agree.

The litigation model with a primary emphasis on establishing a binding precedent in court to accomplish social change through law is not the paradigm for public interest law in the United States for the 21st Century.

Advocates are implementing strategic campaigns with diverse tactics. First, a collective vision reflects what people want and collective ways of getting it. Second, coalition-building emphasises the diverse values at stake to bring stakeholders together. Third, multidisciplinary research and analyses including financial, demographic, and historical studies provide hard

data to support reform. Legal analyses combine different bodies of law to use the strengths of one body of law to shore up the weaknesses of another. Fourth, policy and legal advocacy outside the courts focuses on public education and the planning and administrative processes. Fifth, strategic media campaigns, including use of the web, help build support. Sixth, it is necessary to creatively engage opponents to find common ground. Litigation remains available when necessary within a broader campaign. Finally, strategic campaigns should make concrete improvements in people's lives, give people a real sense of their own power, and alter the relations of power.[30]

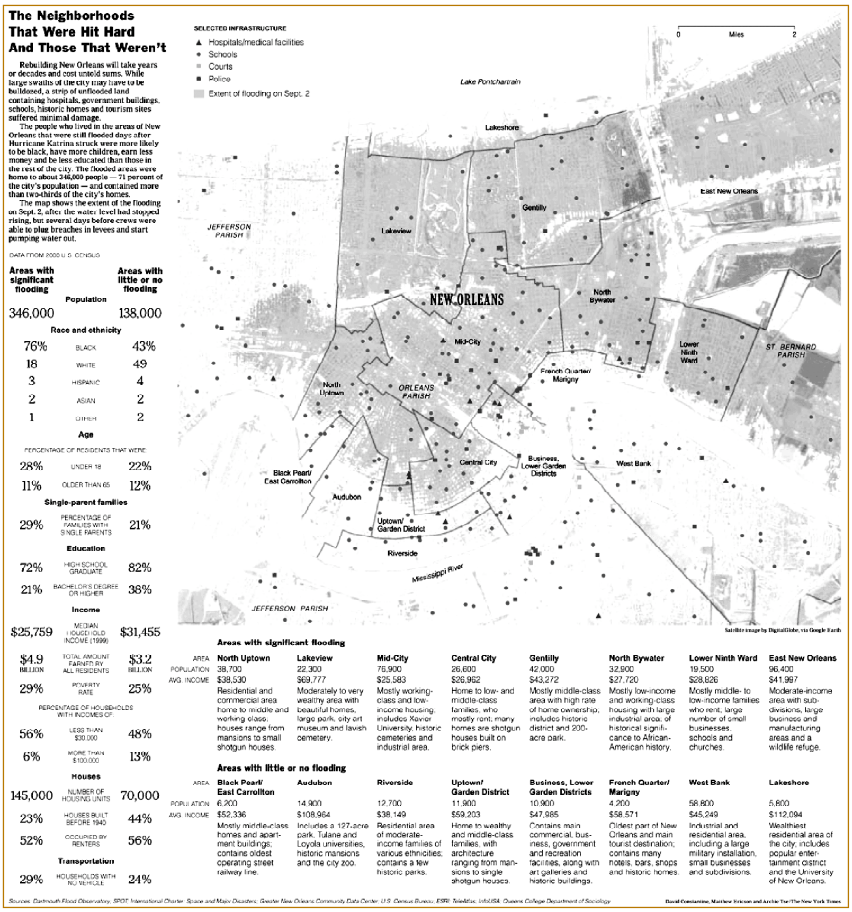
Emphasising the diverse values at stake is a core strategy to bring people together to create the kind of community where we want to live and raise children. Articulating the values at stake to appeal to different stakeholders is consistent with the call of Professor George Lakoff from the University of California, Berkeley, to build a progressive movement which frames issues around shared values that define who progressives are and that encompasses the work done by groups working in many different areas.[31]

We thank FLAC for organising this international conference so that we can learn from each other how to achieve equal justice, democracy and livability for all. In Ireland, advocates are assessing how public interest law and litigation could be more widely used to serve disadvantaged and vulnerable groups, in a nation where it has traditionally not been extensively used. In the United States, where public interest law and litigation have been extensively used, we are reassessing the strategies of the 20th Century to redefine public interest lawyering for the 21st Century.

The struggle never ends.

Appendix

Source: New York Times, September 12, 2005



The Neighborhoods That Were Hit Hard And Those That Weren't

Rebuilding New Orleans will take years or decades and cost untold sums. While large swaths of the city may have to be bulldozed, a strip of unflooded land containing hospitals, government buildings, schools, historic homes and tourism sites suffered minimal damage.

The people who lived in the areas of New Orleans that were still flooded days after Hurricane Katrina struck were more likely to be black, have more children, earn less money and be less educated than those in the rest of the city. The flooded areas were home to about 340,000 people — 71 percent of the city's population — and contained more than two-thirds of the city's homes.

The map shows the extent of the flooding on Sept. 2, after the water level had stopped rising, but several days before crews were able to plug breaches in levees and start pumping water out.

DATA FROM 2000 U.S. CENSUS

Areas with significant flooding		Areas with little or no flooding
Population		
346,000		138,000
Race and ethnicity		
76%	BLACK	43%
18	WHITE	49
3	HISPANIC	4
2	ASIAN	2
1	OTHER	2
Age		
PERCENTAGE OF RESIDENTS THAT WERE		
28%	UNDER 18	22%
11%	OLDER THAN 65	12%
Single-parent families		
29%	PERCENTAGE OF FAMILIES WITH SINGLE PARENTS	21%
Education		
72%	HIGH SCHOOL GRADUATE	82%
21%	BACHELOR'S DEGREE OR HIGHER	38%
Income		
$25,759	MEDIAN HOUSEHOLD INCOME (1999)	$31,455
$4.9 BILLION	TOTAL AMOUNT EARNED BY ALL RESIDENTS	$3.2 BILLION
29%	POVERTY RATE	25%
PERCENTAGE OF HOUSEHOLDS WITH INCOMES OF		
56%	LESS THAN $30,000	48%
6%	MORE THAN $100,000	13%
Houses		
145,000	NUMBER OF HOUSING UNITS	70,000
23%	HOUSES BUILT BEFORE 1940	44%
52%	OCCUPIED BY RENTERS	56%
Transportation		
29%	HOUSEHOLDS WITH NO VEHICLE	24%

SELECTED INFRASTRUCTURE
- Hospitals/medical facilities
- Schools
- Courts
- Police
- Extent of flooding on Sept. 2

0 Miles 2

Lake Pontchartrain, Lakeshore, East New Orleans, Gentilly, Lakeview, JEFFERSON PARISH, NEW ORLEANS, North Bywater, Mid-City, Lower Ninth Ward, ST. BERNARD PARISH, French Quarter/ Marigny, North Lakeview, ORLEANS PARISH, Central City, Business, Lower Garden Districts, West Bank, Black Pearl/ East Carrollton, Audubon, Uptown/ Garden District, Riverside, Mississippi River, JEFFERSON PARISH

Satellite image by DigitalGlobe, via Google Earth

Areas with significant flooding

AREA	North Uptown	Lakeview	Mid-City	Central City	Gentilly	North Bywater	Lower Ninth Ward	East New Orleans
POPULATION	38,700	22,300	76,900	26,600	42,000	32,900	19,500	96,400
AVG. INCOME	$38,530	$69,777	$25,583	$26,952	$43,272	$27,720	$28,826	$41,997
	Residential and commercial area home to middle and working class houses range from mansions to small shotgun houses.	Moderately to very wealthy area with beautiful homes, large park, city art museum and lavish cemetery.	Mostly working-class and low-income housing, includes Xavier University, historic cemeteries and industrial area.	Home to low- and middle-class families, who mostly rent, many homes are shotgun houses built on brick piers.	Mostly middle-class area with high rate of home ownership, includes historic district and 200-acre park.	Mostly low-income and working-class housing with large industrial area of historical significance to African-American history.	Mostly middle- to low-income families who rent, large number of small businesses, schools and churches.	Moderate-income area with subdivisions, large business and manufacturing areas and a wildlife refuge.

Areas with little or no flooding

AREA	Black Pearl/ East Carrollton	Audubon	Riverside	Uptown/ Garden District	Business, Lower Garden Districts	French Quarter/ Marigny	West Bank	Lakeshore
POPULATION	6,200	14,900	12,700	11,900	10,900	4,200	58,800	5,800
AVG. INCOME	$52,336	$108,964	$38,149	$59,203	$47,985	$58,571	$45,249	$112,094
	Mostly middle-class homes and apartment buildings; contains oldest operating street railway line.	Includes a 197-acre park. Tulane and Loyola universities, historic mansions and the city zoo.	Residential area of moderate-income families of various ethnicities; contains a few historic parks.	Home to wealthy and middle-class families, with architecture ranging from mansions to single shotgun houses.	Contains main commercial, business, government and recreation facilities, along with art galleries and historic buildings.	Oldest part of New Orleans and main tourist destination; contains many hotels, bars, shops and historic homes.	Industrial and residential area, including a large military installation, small businesses and subdivisions.	Wealthiest residential area of the city; includes popular entertainment district and the University of New Orleans.

Sources: Dartmouth Flood Observatory; SPOT International Charter; Space and Major Disasters; Greater New Orleans Community Data Center; U.S. Census Bureau; ESRI; TeleAtlas; InfoUSA; Queens College Department of Sociology

David Gonzalez, Matthew Ericson and Archie Tse/The New York Times

1 Robert García is Executive Director of the Center for Law in the Public Interest in Los Angeles, California. He has influenced the investment of over $20 billion in underserved communities through the urban park movement, public school construction and modernisation and the *MTA* environmental justice litigation in Los Angeles. He previously served as an Assistant United States Attorney in the Southern District of New York under Rudoph W. Giuliani. He has published and lectured widely on social change and law. The Center for Law in the Public Interest is a non-profit law firm in Los Angeles, California, that seeks equal justice, democracy and livability for all by influencing the investment of public resources to achieve results that are equitable, enhance human health and the environment and promote economic vitality for all. The Center works with diverse coalitions to serve the needs of the community as defined by the community. See http://www.clipi.org.

2 *Time Magazine*, 19 September 2005.

3 Email from Noeline Blackwell to Robert García, 30 September 2005.

4 The author previously served as Western Regional Counsel with the NAACP Legal Defense & Education Fund, Inc.

5 On both sides of the Atlantic, critics argue that the law should not be used for 'social engineering.' This position reflects a fundamental misunderstanding of the nature of law, lawyering and the judiciary. Equal justice protections are part of the law. Equal justice protections are enshrined, for example, in the United States in the Constitution and other laws and in Ireland in the Constitution and European Convention on Human Rights. Enforcing equal protection provisions is a way of enforcing the law. Enforcing tax breaks for the rich and subsidies for corporate welfare are ways of enforcing the law. Does enforcing the law have 'social engineering' implications in each context?

6 See generally *Simple Justice* (1978).

7 See generally Sandy Banks, 'The Shame of the Nation: The Restoration of Apartheid Schooling in America' by Jonathan Kozol, *L.A. Times Sunday Book Review*, 18 September 2005.

8 The book includes a section by Robert García and Erica Flores in the chapter called 'We Shall Be Moved: Community Activism as a Tool for Reversing the Rollback'.

9 Funding to support public interest law and litigation is a central concern in the United States and Ireland. Developing a diverse funding base is necessary. Funding sources include awards of attorneys' fees in successful litigation, grants from foundations, support from major donors and other individuals, financial support from organised bar associations and fundraising events such as dinners honouring civic leaders. Legal aid organisations in civil cases and public defenders in criminal cases rely on government funding. Some organisations do not seek government funding to preserve their independence and to avoid potential conflicts of interests with the agency providing the funding. Private law firms also co-counsel with non-profit organisations like the Center for Law in the Public Interest to provide attorney time and advance the costs of litigation. Private firms can also donate fee awards to the Center. In the United States, public interest litigants can recover attorneys' fees and costs in successful cases. They are not liable for fees or costs in unsuccessful litigation. In Ireland, on the other hand, prevailing public interest litigants can recover fees and costs, but are liable for fees and costs if they lose. This is a potential area for reform under Irish law.

10 See generally Robert García and Erica Flores, 'Healthy Children, Healthy Communities, and Legal Services', published in a special issue on 'Environmental Justice for Children' in the *Journal of Poverty Law and Policy* by the National Center on Poverty Law and the Clearinghouse Review (May-June 2005); Robert García and Erica Flores, 'Healthy Children, Healthy Communities: Parks, Schools, and Sustainable Regional Planning' in the Urban Equity Symposium in 31 *Fordham Urban Law Journal* 101 (2004).

11 See generally Robert García and Erica Flores, 'Anatomy of the Urban Park Movement: Equal Justice, Democracy and Livability in Los Angeles', a chapter in the book *The Quest for Environmental Justice: Human Rights and the Politics of Pollution,* edited by Dr Robert Bullard and published by the Sierra Club (2005); Robert García and Erica Flores Baltodano, 'Free the Beach! Public Access, Equal Justice, and the California Coast', *Stanford Journal of Civil Rights* (forthcoming 2005); Robert García, Erica Flores & Christopher T. Hicks, *Diversifying Access to and Support for the Forests: Remarks at the National Forest Service Centennial Conference,* Policy Brief, Center for Law in the Public Interest, 2004; Lawrence Culver, *The Garden and the Grid: A History of Race, Recreation, and Parks in the City and County of Los Angeles*, Natural Resources Defense Council Research Project, 2005.

12 The author served as one of the lead attorneys in the *MTA* case and co-authored with Thomas A. Rubin the chapter entitled 'Crossroad Blues: the MTA Consent Decree and Just Transportation' in *Running on Empty* (2004), a book on transportation justice in the United Kingdom and the United States, edited by Professor Karen Lucas of the University of London. 'Crossroad Blues' chronicles this historic struggle for transportation justice and its lessons for equal access to public resources. The case was filed by the NAACP Legal Defense & Education Fund, Inc.

13 See *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977) (differences of two or three standard deviations are suspect).

14 *Governor's Commission on the Los Angeles Riots* (1965).

15 532 US 275 (2001).

16 See generally Robert García and Marc Brenman, *Katrina and the Demographics of Destruction and Reconstruction,* Policy Brief, Center for Law in the Public Interest, September 2005.

17 *New York Times*, 1 October 2005.

18 *New York Times*, 10 September 2005.

19 *New York Times*, 9 September 2005.

20 *New York Times*, 10 September 2005.

21 *New York Times*, 9 September 2005.

22 *New York Times*, 9 September 2005.

23 *New York Times*, 9 September 2005.

24 *New York Times*, 10 September 2005.

25 *Los Angeles Times*, 14 September 2005.

26 *New York Times*, 12 September 2005.

27 *New York Times*, 13 September 2005.

28 *Time Magazine*, 19 September 2005.

29 See Mel Cousins' report in this volume, p30.

30 Midwest Academy, *Organizing for Social Change: Manual for Social Activists,* 2001, Seven Lock Press.

31 George Lakoff (2004) *Don't Think of an Elephant! Know Your Values and Frame the Debate,* Vermont: Chelsea Green Publishing Company; George Lakoff (2002) *Moral Politics: How Liberals and Conservatives Think,* (2nd Ed) Chicago: University of Chicago Press.

Public Interest Law in Ireland

The suit against Secretary of Defence Donald Rumsfeld on behalf of former detainees in Iraq and Afghanistan

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I Introduction

Human Rights First filed suit on 1 March 2005 against Secretary of Defense Donald Rumsfeld in Federal District Court – on behalf of eight plaintiffs (four from Afghanistan and four from Iraq) each of whom suffered serious abuse while in US custody. The American Civil Liberties Union (ACLU) is co-counsel with us in the case.

The allegations by our clients are specific and detailed; they include death threats and mock executions; severe and repeated beatings; sexual humiliation and assault; forcible sleep deprivation; deprivation of food and water; and restraint in contorted and excruciating positions. Each of our clients was released from US custody without being prosecuted for wrongdoing – and without receiving compensation for any of their injuries.

We are asking the court to find that Secretary Rumsfeld violated the US Constitution as well as international laws that prohibit torture and cruel, inhuman or degrading treatment or punishment. We are seeking redress for our clients under the principle that a commander is legally responsible for unlawful conduct which he directly ordered – as well as for unlawful conduct committed by his subordinates which he knew about or should have known about, but failed to take corrective action.

The Complaint charges that Secretary Rumsfeld:

- **Authorised and ratified the unlawful treatment of detainees in US custody**. He had the power to formulate policies relating to the treatment and interrogation of detainees in Iraq and Afghanistan. He was directly and personally involved in setting interrogation rules and exercised his power to allow illegal practices.
- **Knew that torture and abuse were taking place but failed to stop or prevent it**. Through his actions and his failure to act, Secretary Rumsfeld expressly and tacitly authorised his subordinates' unlawful conduct. He exercised effective command over these individuals.

The suit is a civil suit – not a criminal action – and as such, is concerned with establishing the limits of lawful government policies and creating a record about what happened. Our aims are: (1) to achieve some basic redress for our clients; (2) to ensure that senior leadership is held accountable for the decisions that opened the door to abuse; and (3) to make certain that the abuse of detainees is stopped. The remedies that we are seeking include declaratory relief (a declaration from the courts that the policies pursued by Secretary Rumsfeld are illegal) and compensatory damages (some basic recompense for the injuries our clients suffered).

II The process of filing suit

A Introduction

Before I talk in more detail about the substance of the suit, I want to give you a little background on how the suit was brought. I know that one of the most important issues we are considering today is the mechanics of public interest litigation. I'll talk both about the internal process within Human Rights First – and the external process of working with our clients.

B The decision to file suit

Human Rights First's decision to file suit was in some sense reluctantly made. Although we have a long history of challenging government policies – both in our own country and around the world – we have always looked for ways to engage in constructive debate and dialogue with government officials. For two years before filing the suit – long before the Abu Ghraib photographs were first brought to light[2] – we attempted to engage with members of Congress and the Administration in the hopes of spurring reform. We relied on this approach, even after the scope of the abuses became clear. We campaigned vigorously for the creation of an independent commission, appointed by Congress, with broad powers to investigate U.S. detention practices and the treatment of security detainees. Two years on – as new stories continued to emerge and the architects of abusive policies were promoted throughout the government – it became clear that our traditional approach was not yielding the desired results. It was in this context that we decided to file suit.

Recourse to the courts was in many ways a natural next step. In our system of checks and balances, the courts are intended to serve as the ultimate check on government action – a role that the federal courts were already beginning to wield more freely in the broad context of the "global war on terrorism." Over the same two-year period, the courts had begun to take an increasingly active role in limiting the Executive's expansive interpretations of its own powers. In *Hamdi v Rumsfeld*, for example, the Supreme Court held that a US citizen, designated as an enemy combatant, is entitled to an evidentiary hearing in federal court to challenge the basis of his detention. In another Supreme Court case, *Rasul v Bush*, the Court (over heavy government objection) held that the federal courts have jurisdiction to consider legal challenges by non-citizens incarcerated at Guantanamo Bay, Cuba – thereby upending the Executive's attempts to keep these detainees in a legal black hole.

C Our partners and funders

In deciding to file suit, we worked closely with two retired military lawyers who had collaborated with us in our efforts to engage Congress and the Executive on the issue of interrogation practices. These two lawyers are part of a larger group of retired military leaders with whom we have worked (and continue to work) in this regard.

These two retired military lawyers joined the suit as "of counsel" to Human Rights First. They are Rear Admiral John D. Hutson, formerly the Judge Advocate General of the U.S. Navy, and Brigadier General James Cullen, former Chief Judge of the US Army Court of Criminal Appeals. Like us, both Admiral Hutson and General Cullen thought that this case was essential because of policy and leadership failures that led directly to Secretary Rumsfeld.

Human Rights First's work on the case has been funded primarily through the support of private foundations. The private bar has also played an integral role. Lieff Cabraser, a large private law firm, worked closely with us in preparing the complaint and has devoted many *pro bono* hours to the suit – under the direction of Bill Lann Lee, a partner at the firm and a former Assistant Attorney General for Civil Rights at the Department of Justice. My own firm – the Dontzin Law Firm – has also devoted countless hours and resources to the suit. My firm has underwritten the entire cost of my work on the suit and has allowed me to maintain a split position, working both as an associate at the firm and as Senior Counsel at Human Rights First.[3]

III The clients

In preparing the suit, we also worked closely with trusted human rights and humanitarian organisations in both Afghanistan and Iraq to identify individuals who had been detained by the US government. Two joint Human Rights First and ACLU missions travelled to the region to interview the individuals who now appear on the complaint. Many of them still had papers confirming their detention and the circumstances of their release; a few still bore physical signs of the abuse they suffered while in US custody. Drawing on the expertise of human rights field

researchers, we used techniques such as comparing the stories they told us to publicly reported information about US detention operations and detainee treatment, and compared each person's story with the experiences of other detainees held in the same locations at the same time.

At the time we filed the complaint, the eight plaintiffs were between 19 and 48 years old. They had been detained in facilities all over Iraq and Afghanistan under the exclusive control of the US military. After being interrogated and subjected to horrifying abuse, all were released without charge.

Each of our clients told us that he had been arrested by mistake – on a tip from a jealous neighbour, for example, which was not at all an uncommon story. Indeed, at the time we were preparing the complaint, the International Committee of the Red Cross (ICRC) was citing estimates by military intelligence that 70-90% of those detained in Iraq were arrested by mistake. Similarly, the Army Inspector General had estimated that 80% of detainees "might be eligible for release" if their cases had been properly reviewed. Internal military report cited estimates from field that 85-90% of detainees at Abu Ghraib were "of no intelligence value."

The clients have all emphasised that they were willing to come forward in order to seek accountability for what happened and most importantly, to ensure that it can never happen again. So far, two of the Iraqi clients have been granted visas to come to the United States, where they will hopefully have the opportunity to share their stories more broadly.

IV The allegations in the complaints

A Focus on Secretary Rumsfeld, the Policy-Maker

The complaint itself, meanwhile, focuses much-needed attention on Secretary Rumsfeld, the policy-maker, and underscores that none of the military's numerous investigations have effectively explored his role in the abuse (or the role of other senior Department of Defense officials). Indeed, over the last couple of years, despite the prosecutions of low-level soldiers (including those pictured in the Abu Ghraib photographs), the high-level officials responsible for unlawful interrogation policies have not been held accountable.

B Domestic Law Claims

The complaint alleges that these policies violated both US law and law of nations. The domestic law claims are brought pursuant to a 1971 Supreme Court case – *Bivens v Six Unknown Fed. Narcotics Agents* – which allows individuals to sue federal officials in their individual capacity for constitutional violations committed under colour of federal law. The complaint alleges that Secretary Rumsfeld bears both supervisory and policy-making liability under *Bivens* for violations of the Fifth Amendment to the US Constitution (which prohibits abusive practices that shock conscience) and the Eighth Amendment to the US Constitution (which forbids cruel and unusual punishment).

The Complaint alleges that Secretary Rumsfeld is liable as a policymaker because he authorised a string of abusive practices that led directly and predictably to our clients' injuries.

On 2 December 2002, for example, Secretary Rumsfeld approved a list of unlawful interrogation techniques for Guantanamo – including stress positions, removal of clothing, exploiting individual detainee phobias (such as fear of dogs), deception to make the detainee believe he was in country that permits torture and 20-hour interrogations. These techniques were contrary to the established military standards governing detention and interrogation as set forth in Army Field Manuel 34-52.

In the act of approving these techniques, Secretary Rumsfeld undercut our nation's longstanding (and deeply-rooted) prohibition on the use of torture. That message was heard loud and clear down the chain of command.

Within the month, many of the same illegal techniques were also being used in Afghanistan. In January 2003, the US commander in Afghanistan reported the new techniques they were using to a Working Group in Washington DC established by Secretary Rumsfeld (including stress positions, the use of dogs to incite fear and sensory deprivation). Officials in Secretary Rumsfeld's Working Group never expressed any objections to these techniques (although they fell outside of accepted protocol) and, thus, military commanders back in Afghanistan considered the techniques to be "approved policy."

Many of these techniques later spread to Iraq because military intelligence officers who had been stationed at Bagram were transferred to Iraq in the summer of 2003. These officers implemented the Afghan techniques at Abu Ghraib. Around the same time, Secretary Rumsfeld deployed General Miller (the Guantanamo commander) to Abu Ghraib to "gitmo-ize" its interrogation and detention procedures (according to the head of Military Police operations in Iraq). Among other techniques, Miller recommended the use of dogs.

By this point, Secretary Rumsfeld had modified his original December 2002 Guantanamo policy, to a new policy (April 2003), which rescinded some of the earlier methods but still permitted techniques such as false flag,[4] prolonged solitary confinement, sleep manipulation, dietary manipulation and environmental manipulation. Even harsher techniques could also be used with his authorisation. We know that Secretary Rumsfeld did approve harsher techniques for individual cases.

The Complaint also alleges that Secretary Rumsfeld is liable as a supervisor because although he knew that guards and interrogators were deployed to Iraq and Afghanistan without adequate training, he placed intense pressure on the military to deliver actionable intelligence. He (and his commanders) also had countless indications over a lengthy period that things were going very wrong. But he failed to take corrective action. For example:

- In December 2002, the Washington Post reported on the systematic abuse of detainees at the US Air Base in Bagram, Afghanistan, including use of stress and duress techniques. That same month, two detainees were brutally beaten to death at the Bagram base. Their deaths were classified as homicides. Those responsible for the killings were part of the same military intelligence unit that was subsequently transferred to Abu Ghraib.
- By March 2003, prominent papers (such as the *New York Times*, *Wall Street Journal* and the *Atlanta Journal-Constitution*) were publishing articles on persistent reports of violations against detainees in Guantanamo and Afghanistan.
- Starting in May 2003, the ICRC began sending reports to US officials on the abuse of detainees in Iraq (noting that there was physical evidence to back up the detainees' claims). Another ICRC report (detailing 50 incidents of abuse) was submitted in July 2003. Secretary of State Colin Powell has said he kept Secretary Rumsfeld apprised of their contents.

C International Law Claims

The international law claims, meanwhile, are brought pursuant to the Alien Tort Claims Act, a 1789 statute which creates a cause of action over torts committed against non-citizens in violation of international law. Here, Secretary Rumsfeld is sued under the Third and Fourth Geneva Conventions and the Convention Against Torture – under theories of both direct and indirect command responsibility. He is liable as direct commander because he formulated abusive policies. He is liable as indirect commander because he had actual and effectual command over soldiers who committed the abuses. Despite being warned of their actions, he failed to take corrective action.

V Conclusion

The suit is currently pending in the US District Court for the District of Washington DC (before District Judge Thomas Hogan). We anticipate that the next development in the case will be a Motion to Dismiss from the government. Meanwhile, we are still pursuing our efforts to engage directly with Congress and the Administration. We are still campaigning for the creation of an independent commission to investigate the detention abuses. We are also actively campaigning in support of two recent legislative proposals by Senator John McCain, a former prisoner of war, to bar the "cruel, inhuman, and degrading treatment" of detainees – and to limit interrogation techniques to those approved by the US Army's own Field Manual. Both measures are being actively opposed by the administration.

1 Human Rights First is a leading human rights advocacy organisation based in New York City and Washington, DC. It was established in 1978 and was formerly known as the US Lawyers' Committee for Human Rights.

2 The Abu Ghraib photographs were leaked in April 2004.

3 Human Rights First is co-counsel with the ACLU on the Rumsfeld case, but there are also three parallel ACLU cases against military commanders which were filed at same time – against Lt Gen. Ricardo Sanchez (who served as head of US forces in Iraq 2003-2004); Brig. Gen. Janis Karpinski (who was head of the Military Police in Iraq, including those pictured at Abu Ghraib); and Col. Thomas Pappas (who was head of intelligence gathering operations in Iraq, including at Abu Ghraib).

4 Covert operation by a government or corporate body/organisation which is designed to appear as if it is being carried out by another entity.

Geoff Budlender, Advocate of the High Court, South Africa; Peter Ward, Chairperson, FLAC;
Robert Garcia, Executive Director, Center for Law in the Public Interest, Los Angeles, California.

Public Interest Law: the South African Experience

Geoff Budlender, Advocate of the High Court, South Africa

South African public interest law really took off towards the end of the 1970s, when several public interest law organisations were formed. Their methods varied, but there were a number of elements which they had in common: they aimed to work on or through the law as a means of promoting social justice; they wished to tackle justice issues in a strategic manner; they believed that the courts were a potentially useful "site of struggle" against apartheid; and they employed full-time salaried lawyers devoted to this work; they were initially funded mainly by US foundations.

Between the late 1970s and 1994, public interest lawyers took on a wide range of issues with some success. In 1994, we finally achieved a democratic Constitution, with a Bill of Rights. That did not bring an end to public interest law. On the contrary, it provided public interest lawyers with the tools which they needed to do their work. That work continues.

In the time available to me, I want to tell briefly the story of two sets of cases – one under apartheid and one after 1994 – which illustrate the work which public interest lawyers have done in South Africa. Then I will reflect on some of the lessons which we have learnt from this work.

The first story is about the pass laws. The pass laws were at the heart of apartheid. They prohibited black Africans from living in the towns without a permit, unless they qualified for a statutory exemption. They controlled movement, residence and employment. They destroyed family life.

A series of cases was planned and taken through the courts. Plaintiffs were carefully selected to ensure that the cases with the most favourable facts came before the courts. Three times the highest court, the Appellate Division, was engaged. Each time, the Appellate Division ruled in favour of greater freedom for the people affected. It did this by very conventional means which will be familiar to lawyers in common law systems. It did so by holding that an Act of Parliament did not authorise a particular regulation, by holding that a regulation could not deprive someone of a statutory right and by interpreting a statute in favour of the liberty of the individual.

By this time, the pass laws had become increasingy difficult to enforce in a modern economy. People were ignoring them, in increasing numbers. In 1986, the pass laws were repealed. I will say something later about the significance of the litigation in contributing to this outcome.

There were many other cases. The courts declared unlawful the removal of a tribe from its land; ordered the release of some 'security' detainees – though not many; struck down the election of a repressive client regime of the government on the basis that women had not been permitted to vote; avoided statutory ouster provisions by holding that they applied only to lawful actions; ordered the reinstatement in their jobs of striking mineworkers; and so on. Cases such as these were taken to court by the new public interest lawyers or by private lawyers who were paid from overseas funds.

It is difficult for a participant in this movement to give an impartial judgment on how successful they were overall. However, I think most informed observers would share the judgment of Richard Abel, an eminent sociologist of law, who in 1995 after an exhaustive analysis of "law in the struggle against apartheid," asked the question, "Did law make a difference?", and

concluded "(t)he bottom line is an unambiguous yes."[1] I think it is fair to say that the public interest law movement made a significant contribution to the movement for democracy in South Africa.[2] This happened in a legal system in which the courts were not permitted to pronounce on the validity of any statute passed by Parliament.

Now let me jump almost 20 years, to 2000. By then, a legal revolution had taken place in South Africa. We had a new Constitution, which contained a generous and justiciable bill of rights, including social and economic rights.

My second story is about HIV/AIDS. It is one of the greatest crises facing South Africa. We have very high rates of infection and death. The single greatest cause of transmission of the virus is from mother to child, at birth. An inexpensive anti-retroviral drug, which is easily administered at the time of birth, can dramatically reduce the rate of transmission. But the government refused to provide it on a comprehensive or extensive basis. Some senior people in government have a deep scepticism about the proposition that HIV causes AIDS, which can be treated by anti-retroviral drugs – this despite overwhelming scientific evidence and the registration of the drug by the official medicine regulatory body. But the government dug in its heels.

A non-governmental organisation, the Treatment Action Campaign, and a group of paediatricians challenged the government's refusal to provide an inexpensive life-saving medicine. The Constitutional Court found that the government had failed to comply with its constitutional duty to take reasonable measures, within its available resources, to provide access to health care services. The Court ordered the government to undertake a comprehensive roll-out of the drug.

There were concerns about the extent to which the government would implement the order. The Treatment Action Campaign is an umbrella organisation which represents churches, trade unions, and many other bodies, and also people living with AIDS. It monitored the implementation of the order, it campaigned in the media, and it took the struggle into the streets and into parliament. There has been substantial compliance. The TAC's campaign was so successful that the government has felt compelled to undertake to provide anti-retroviral drugs not only to pregnant women, but also to others who need them.

This case does not stand on its own. Public interest litigation under our new Constitution has resulted in a declaration that the state housing programme does not meet the requirements of the Constitution, because it does not make provision for the urgent needs of people who are truly homeless or living in intolerable circumstances; in orders on the government to make provision for prisoners exercise the right to vote; in a declaration that excluding non-citizen permanent residents from state social welfare benefits is unlawful; in a declaration that a state-owned rail corporation is under a duty to take reasonable measures to protect its passengers from attack on the trains; in the striking down of the exclusion of African women from inheriting from the intestate estates of their husbands or fathers; and in the striking down of laws which discriminated against gays and lesbians.

From this account, I want to deal with two issues. First, how could the earlier gains have been made in apartheid South Africa? Second, what have we learnt more generally about how to achieve effective public interest lawyering?

Public interest law under apartheid

Apartheid was unique in the way in which the country's citizens were rigidly classified into racial groups, and rights and duties distributed differently to racial groups. But South Africa is not the only country in which a minority has exercised political power over the majority. It is also not the only country which has suppressed opposition through a repressive state apparatus. However, an unusual feature of the South African system was that all of this was done through the law. The government could discriminate against its citizens - but first it

passed a law saying that it could do so. People could be forcibly removed from their homes – through a law. Opponents could be detained without a trial, but there had to be a law to authorise this. If they were tortured, it was unlawful, and so there had to be an elaborate system of lies and censorship to deny that torture happened at all – not because it was brutal, but because it was unlawful. And so discrimination and repression were mediated through the law. This had consequences. The historian EP Thompson, reviewing the relationship between state absolutism and the courts of eighteenth century England, drew the following conclusion:

> The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion by actually *being* just.[3]

The South Africa courts *were* in fact sometimes just. The country had a tradition of courts which were formally independent, at least at the level of the higher courts. The effect of this formal independence was limited by the fact that the judges were all white (and almost all male). They brought with them to the bench the perceptions, prejudices and assumptions of their peers. But they believed that they were independent and they generally acted out their belief. The result was that it was often possible to attempt to hold the system to its promises of consistency and lawfulness.

South African legal activists complained about the 'positivism' of South African judges. By this they meant that judges had no regard to the values which were supposed to underlie the legal system or to the consequences of the manner in which they interpreted statutes. The judges pretended that they were undertaking a purely mechanical task of reading and interpreting words. But this had some positive results. In many of the successful cases, laws were mechanically interpreted in a way which was in conflict with the true intention of the lawmaker, because the lawmaker had not clearly enough expressed its intention. Most of the public interest cases were in fact heard and decided by conservative 'old school' judges, who were "just doing their job".

There were limits to all of this. There would have been no possibility of success if the legal attack had threatened the very foundations of the system. That is most clearly shown by the acquiescence of the courts in the government's abuses during states of emergency. Those cases demonstrated what has been seen in other countries: that when courts perceive that 'society' is under attack, they tend to close ranks with those in power.

In the 1980s another critical factor was the changing political climate. It was a period of renewed mass resistance to apartheid. Economic sanctions against South Africa were starting to bite. Government was keen to present a reformist face to the world, and so it generally did not reverse by legislation the gains which had been achieved in the courts.

The conclusions I draw about why this work was possible during the late apartheid period are the following:

- The state exercised its power through the legal system.
- The judges believed that they were independent, and most acted out that belief.
- The conservatism of most of the judges, adopting a 'positivist' or technicist method of interpreting the law, created opportunities to have the laws interpreted in ways which did not favour the government.
- The cases were brought at the right time, when a favourable political climate enabled activists to use local and international pressure on the government to protect favorable decisions of the courts.

Structuring public interest litigation

The lessons of public interest lawyering under apartheid have not been contradicted by the experience of public interest litigation in a democracy. They remain the same and their validity is underlined by the fact that they have manifested themselves in a very different political and legal environment.

There had been public interest lawyers in South Africa before the new wave. What was different once the new wave arrived was the number of people involved and the fact that some of them worked full-time in this area. Having full-time lawyers made it possible to plan the work strategically. One of the key pass law cases was described in the funding proposal which the Legal Resources Centre sent out in 1978, before it had even opened its doors. The case was planned long before it went to court. Suitable clients were carefully selected [4] and the case was finally decided in 1983. This careful strategic planning was made possible by having people dedicated full-time to the work.

The Legal Resources Centre established a board of trustees with the multiple functions of giving advice and guidance to the staff, giving the organised profession sufficient confidence that it would provide waivers of its rules and providing protection against hostile government action. The trustees included leaders of the established legal profession and ultimately included some retired and sitting judges.[5]

Another lesson was the value of high-volume 'routine' casework alongside the precedent-setting cases. The high-volume work was useful for three reasons: to identify common problems which needed a legal solution; to identify suitable litigants for the 'test' cases; and to enforce decisions of the courts on the ground. Of course, the volume work and the test cases can be done by separate organisations, if they plan their strategy together. The Legal Resources Centre worked closely with the Black Sash, a non-governmental organisation which ran advice offices and had an enormous caseload. The Centre itself handled literally hundreds of cases in the aftermath of the first test case on the pass laws, and took six further cases to the Supreme Court to ensure that the judgment was carried out in practice.

Case selection was critical for the test cases. The lawyers learnt a new adage: the law emerges from the facts. Caselaw develops incrementally and at each stage the most sympathetic case has to be found and the facts carefully placed before the court.

A key issue was the link with popular movements. A case could be designed by lawyers, but it could not work unless there were clients with the courage to stand up for their rights. Links with popular movements were best demonstrated in the area of labour law, where the emergent trade unions made skilful use of lawyers to build an entirely new labour jurisprudence and to protect themselves as they grew into a powerful social force. To me, this was a fundamental point. There were limits to what the lawyers on their own could achieve.

This lesson was underlined by the experience in the new constitutional era. We have learnt that judgments which require the government to take positive action are sometimes only as effective as the ability of social movements to insist on effective implementation.

We learnt, too, that legal activism does not take place only in the courts. A sympathetic Member of Parliament can be a valuable ally. The press has a critical role to play in influencing public opinion and in exposing the truth.

An area where the public interest lawyers could have done better was through co-operation with lawyers in private practice, who were sympathetic and willing to donate some of their time. This was demonstrated in 1979, when the government started many hundreds of prosecutions of black people who were living illegally in the areas of Johannesburg set aside by law for whites. There was seldom a legally valid defence. But the private profession came to

the rescue. A large number of lawyers agreed to represent the accused people for free. The prosecution now found that they had to prove every element of the offence – the race of the person prosecuted, the racial demarcation of the area concerned, the residence of the accused in the area. And after conviction, there was further argument about sentencing. Simply making the prosecution do its job in every case brought the campaign of prosecutions crashing to the ground because of the time involved. [6]

This was a shining example of co-operation between the public interest lawyers and the private profession. [7] Regrettably, the examples were too few. The new public interest lawyers were so busy with their 'own' work that they failed to mobilise other resources which could have multiplied the impact of what they were doing.

The lessons I have learned from all of this are the following: [8]

- There is a need to create institutions which are dedicated to this work, and which can undertake it in a systematic and strategic manner. There is a need to plan the work strategically, select the right lawyer, select appropriate cases, select the proper forum, and select the right defendant. The institution needs to work with other institutions to maximise the impact of a single case and to celebrate partial victories.

  This is demonstrated by the story of public interest litigation in South Africa. In an important book based on careful study of four other societies (USA, India, UK and Canada), Charles Epp has come to a similar conclusion: successful rights revolutions depend as much on what he calls 'support structures for legal mobilisation' as they do on variables such as favourable constitutional conditions, a sympathetic judiciary, and public rights consciousness.[9] Typically, the support structures are public interest litigation centres and rights advocacy organisations.

- There is a need to build public interest law institutions which are sturdy and sustainable – financially, politically, structurally.

- 'Routine' casework can be very important in identifying important issues to litigate, finding the right client and ensuring that favourable court decisions are implemented in practice. The casework can be done by either the litigating organisation or by an associated organisation, with the two co-operating closely in sharing information and strategies.

- The effect of the legal work is greatly strengthened by links with community organisations. The lawyers can provide valuable organisational support to those movements.

- Effective legal activism needs to be linked with lobbying and work through the media, parliament and other institutions which can inform and change public and government behaviour.

- The impact of the work of the public interest lawyers can be greatly multiplied if they cooperate with sympathetic lawyers in private practice.

The legal framework in South Africa is now extremely favourable for public interest litigation. Procedural innovations have further opened the door. The poor, the vulnerable and the marginalised have benefited very substantially from this litigation.

And yet – it must immediately be acknowledged that despite this highly favourable legal environment, the benefit has often been less than we had hoped. Significant progress has been made, but despite the generous provisions of the bill of rights, many people live under conditions which mock the promises we made to one another as we established a new nation. The school system remains highly unequal, despite the right to education and the right to equality.

There are many reasons for this. I will mention four briefly. One is the sheer magnitude of the challenges facing the new society and the new state machinery. Another is the failure of the state, particularly in some parts of the country, to set up and maintain effective state administrative procedures. Another is the failure of civil society to mobilise and assert and enforce the new rights – a key element of any rights-based approach. And another, somewhat paradoxically, is the shortage of public interest lawyers willing and able to undertake the necessary litigation. A major factor in this has been the withdrawal of funding for public interest law. Many donors felt that their purpose had been achieved and moved on to other things.

Steps are now being taken to address this by mobilising the resources of the private profession through a new institution, along the lines of the Public Interest Law Clearing House in Australia and New York Lawyers for the Public Interest. This model involves creating an institution which will encourage and enable private practitioners to offer some of their time for this work on a *pro bono* (no charge) basis; identify issues and cases for litigation through working with civil society organisations; screen the cases to identify those which are suitable for litigation; and match the cases with the lawyers.

Conclusion

The work of South African public interest lawyers did not end in 1994. Now they have a new challenge — to hold the new government to the promises of our new democracy, to make democracy real and to make democracy a means of sharing the resources of our country among all its people. They have powerful new tools: a constitution with a strong and extensive bill of rights; a new Constitutional Court with a firm commitment to human rights; new legal rules which give standing to those who seek to promote the public interest; and new administrative, political and legal remedies for our problems. The public interest law movement has to play a creative role in building our new democracy. At least for South Africans, the lessons from the struggle against apartheid remain as valid as ever in this new context.

1 Richard L Abel (1988) *Politics by Other Means: Law in the Struggle Against Apartheid 1980-1994*, p533.

2 I do not intend to enter here into the issue of whether they legitimised a fundamentally illegitimate legal system. My views on this are expressed in my chapter "On Practising Law" in Hugh Corder (ed) (1988) *Essays on Law and Social Practice in South Africa*.

3 E P Thompson (1975) *Whigs and Hunters*, p 265.

4 The first two carefully selected cases came to nothing from a 'public interest' point of view, when the administration conceded them administratively before they reached court. Mr Rikhoto was the third client who was selected as presenting a particularly favourable set of facts.

5 Professor George Cooper described the Trust as a "heat-shield." George Cooper (1980) "Public Interest Law – South African Style", *Columbia Human Rights Law Review*, Vol. 12, p105.

6 The campaign of prosecutions finally collapsed when in the *Govender* case, a rights-minded judge held that even after the accused had been convicted of living in the area illegally, the availability of alternative accommodation had to be considered before an order for eviction could be made.

7 A few years earlier, private lawyers in Cape Town had co-operated in a similar manner to support resistance to the destruction of the Crossroads 'squatter' camp.

8 I need here to acknowledge a justly celebrated article by Gary Bellow, which deeply influenced my own thinking at the time when I was entering this field: 'Turning Solutions into Problems: The Legal Aid Experience' *NLADA Briefcase* Vol. 34, No. 4 (August 1977). Many of the South African lessons are foreshadowed in this article.

9 Charles R Epp (1998) *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*.

Setting the context for Public Interest Law and Litigation in Ireland: The Draft Bill of Rights in Northern Ireland

Prof Monica McWilliams,

Chief Commissioner, Northern Ireland Human Rights Commission

Introduction

Thank you for inviting me to speak at this conference. As the new Chief Commissioner of the Northern Ireland Human Rights Commission, I have listened with considerable interest to the views expressed so far. My purpose today is to set out how the public interest law work of the Northern Ireland Human Rights Commission has developed in its first six years of existence, and then to discuss how that might change if and when we secure the enactment of a comprehensive Bill of Rights in our jurisdiction.

First, the work of the Commission. Through our casework function we provide independent specialist advice on human rights matters to individuals. The Commission also has the power to provide assistance to individuals for help in relation to proceedings involving law and practice concerning the protection of human rights. The Northern Ireland Act specifies that the Commission may grant assistance if the case raises a question of principle; if it would be unreasonable to expect the person to deal with the case without assistance, for example because of its complexity; or if there are other special circumstances.

The Commission has developed detailed criteria to guide us in making these decisions. We are in the process of developing a new Strategic Plan and, while aspects of the right to life are sure to feature, we will look at defining new priorities for casework, possibly around themes such as access to justice. This will, as before, be linked into the campaigning and investigations work of other parts of the Commission. We would much rather secure a change in law, policy or practice through lobbying, where we can rely on the whole corpus of human rights law, than challenge it in the courts, where the only instrument that has any real weight is the European Convention.

In a given year, we have around 600 complainants come to us alleging that their human rights have been violated. We therefore have to be very selective about the cases that we even think about litigating. The vast majority of complainants are provided with advice, referrals and informal mediation-type work, so that only a very small proportion of cases actually come to be assessed formally by our Casework Committee. We nevertheless believe that the great majority of those whose complaints we resolve at these initial stages are satisfied with the expert service that our caseworkers deliver. Last year, the Commission considered 49 applications for assistance from individuals and granted assistance in 11 cases. Of those assisted, four cases involved an alleged violation of Article 2 of the European Convention on Human Rights. More recently, the Commission has, for example, supported legal action to improve the conditions for women prisoners in Northern Ireland.

The Commission has launched cases in its own name. For example, the Commission recently sought judicial review of the decision of the Northern Ireland Office not to grant access to the Juvenile Justice Centre in Rathgael, Bangor. The case was eventually settled, with the Commission gaining access in 2005. In 2004, we took a case against the Prison Service after its refusal to supply the Commission with documents relating to deaths of prisoners in custody. On this occasion, the Prison Service agreed to supply the information sought and the proceedings were withdrawn. These cases suggest that litigation, or simply the threat of it, can achieve results if used strategically.

There is one public law technique available to us that is proving increasingly cost-effective and that allows us more freedom to argue broader human rights points. The Commission is empowered to intervene in legal proceedings, as a third party or *amicus*. Of course we had to go as far as the House of Lords to vindicate our right to do so, after the Northern Ireland courts challenged our standing as an intervenor. I am happy to say that we now meet very little resistance to the concept that we can bring an added value to the thinking of the courts. The Commission has intervened in several cases, for example, in July 2003 in the *Amin* case in the House of Lords. Here the Commission was able to set out its views on the scope of Article 2 of the European Convention in the context of deaths of persons held in custody. And only last month, we were given leave to review papers in one of the most opaque areas of our judicial system – the family law courts – to allow us to make up our minds whether to intervene in a particular matter.

These are just some examples of what we do. But they show how Commissions can assist in using law to achieve change. Our experience is that a strategic approach to human rights litigation can work.

A Bill of Rights for Northern Ireland

I want to turn to my second main theme: the Bill of Rights process in Northern Ireland. As many of you know, the Bill of Rights process has now been ongoing for over five years. In that time:

- The Commission received over 300 submissions from individuals and groups in the first consultation exercise, and 368 in the second phase. Some of these were themselves the outcome of consultations within interest groups.
- Some 150 experts took part in nine thematic working groups around such issues and language rights, enforcement and women's rights.
- Over 400 facilitators were trained in the first phase, with 580 participants in second-phase training. We believe that the meetings that they organised and those the Commission itself held meant that we had in the region of 10,000 participants in public meetings.
- In addition, over 1350 children took part in a special consultation.

The new Commission has made the Bill of Rights a priority. The new Commission plans to take forward the process. But we will not be rushed. We want to get this right. We want to reflect fully on the views advanced. The strength of those views indicate how important this process is. We, as a new Commission, want to reach our own conclusions on the best way forward. We will look at the evidence, we will listen and we will decide. What I will say is this: We expect any Bill of Rights for Northern Ireland to be judged on how it advances the protection of vulnerable and marginalised groups. Strategic litigation will – I am certain – be a key factor in making the Bill of Rights function in practice.

Just a few days ago we had the fifth anniversary of the entry into effect of the Human Rights Act 1998. As I said in a press statement to mark the occasion, the Act is unfinished business: it has often been used as a risk management tool rather than placing human rights values at the centre of policy formulation and decision making. It is extraordinary to many of us that the 55-year-old minimum standards set out in the European Convention as the benchmark for a modern democracy are still resented, contested, and subject to derogations and restrictive interpretations. The Bill of Rights has to offer us more than that.

As I said earlier with only two of our ten members having served in the outgoing Commission, we have essentially a new team of people coming to grips with the debates around the purpose, scope and enforcement of a Bill of Rights. It may therefore be a year or more before we are able to formulate our final advice to the Secretary of State, which is the task entrusted to us by the Belfast/Good Friday Agreement and by the Northern Ireland Act. And when we

reach that point, we have another and perhaps even greater task facing us, to try to get the vision into the black letter of the law.

We need to engage with elected representatives – and with the two governments – to secure as much understanding and as much support as we can. Those of course are not synonyms. Not everyone who understands what a Bill of Rights is about will support it. Legislators, in particular, may be suspicious about the extent to which any proposals to make economic and social rights judiciable may restrict their own freedom to direct public resources in accordance with their democratic mandate.

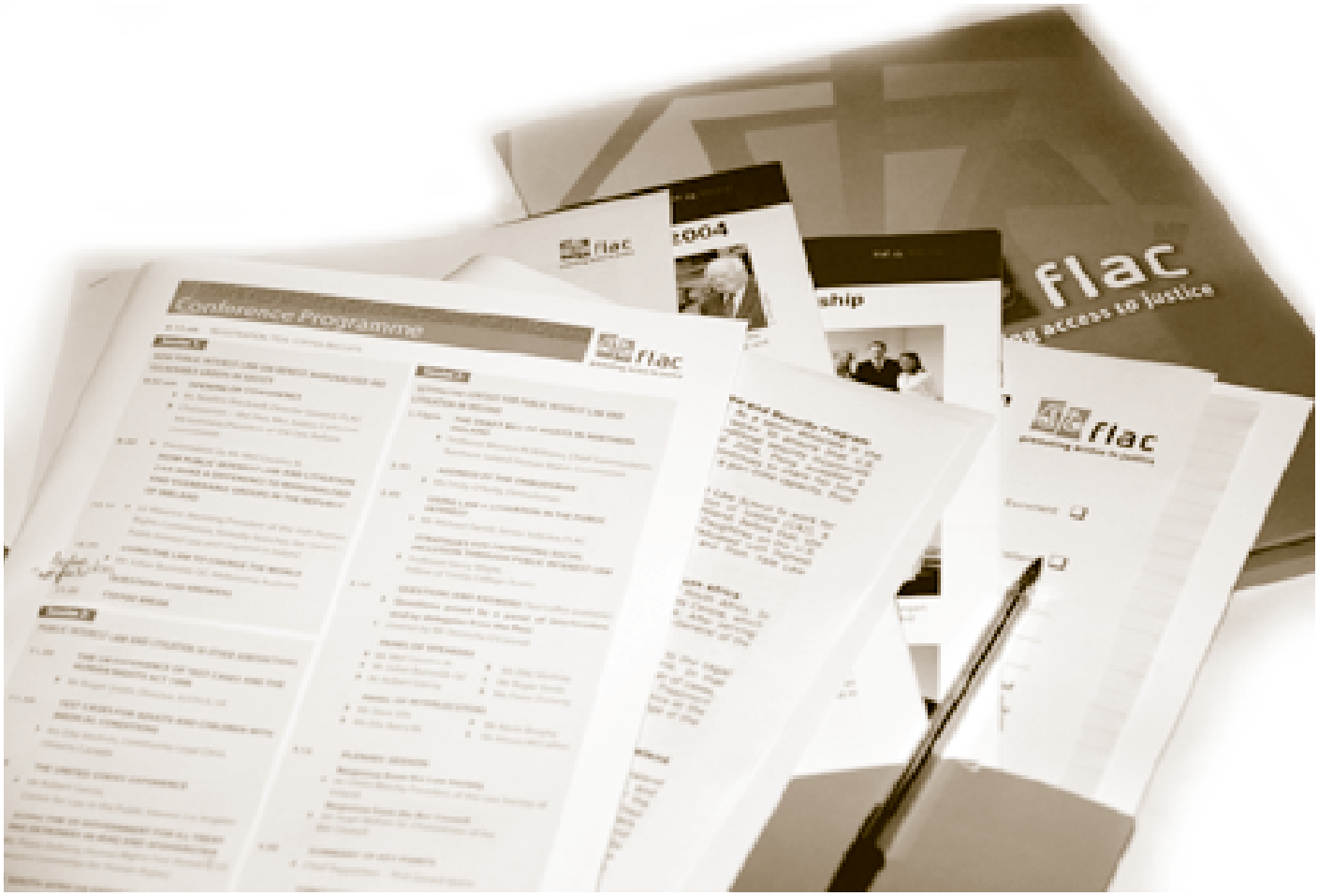
If those of us in the human rights community, and those in the judicial and legal professions, see in the Bill of Rights a weapon with which to go to war with parliaments and assemblies, we have already lost the argument. We depend on Parliament to give us this Bill and the Bill must give Parliament its place. It has to be framed in a way that respects the constitutional separation of powers, and that gives government substantial leeway in terms of spending decisions.

There are, of course, bottom lines and those will be found in the same places where public interest litigation already occurs. The state has duties to its people. The state must guarantee the liberty and safety of the person; it must guarantee access to justice, and remedies for the violation of rights. In the economic and social spheres, no person must be denied their basic needs, their human dignity, their rights to shelter, warmth, health and education. The Bill of Rights may codify this in terms of what the Irish Constitution and many others set out as 'guiding principles' of state policy. But it may not be feasible to secure enactment of a Bill of Rights that allows individuals to sue the state for any and every failure to meet their individual entitlements. A more likely outcome, following the splendid South African model, would be the option of interest groups suing the state over a systemic failure to deliver economic, social or cultural rights, for example by a failure to make adequate or any budgetary provision in an essential area affecting the rights of very many people, or a very vulnerable class of people.

Of course, the individual rights in the civil and political arena need to be litigable by and for individuals. Nothing in the Bill of Rights will water down any protections already contained in the Human Rights Act, or in our wide range of anti-discrimination provisions.

Many of you will know that the essence of the South African Bill of Rights, which I mentioned a moment ago, was sketched out on a kitchen table in Dublin by two people whose credentials for the job went well beyond their legal qualifications. Albie Sachs and Kader Asmal between them knew what it meant to be disabled, to be displaced, to be a refugee, to be a member of an ethnic minority, to be a victim of state persecution, to suffer violent attack, to be committed to challenging racism and oppression. They are now, respectively, prominent in the judicial and executive branches of government in the new democratic dispensation and both of them have helped us at different times in Northern Ireland.

Just as human rights protections were at the heart of the South African settlement, so they were to the fore in the long negotiations that led to our own Agreement. Our task, as a Human Rights Commission, is to ensure that we, with all the energy, resources and public participation that we have at our disposal, do at least as sound as job as was done on that Dublin kitchen table.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The Ombudsman and Information Commissioner — Righting Wrongs and Protecting the Public's Right to Know

Emily O'Reilly, Ombudsman and Information Commissioner

Thank you for inviting me here today to talk to you as part of your deliberations on the context for public interest law and litigation in Ireland. I have long been an admirer of FLAC's human rights work, its dedication to the ideal of equal access to justice for all and of its efforts to eradicate social and economic exclusion.

Public servants ought to serve the public interest and part of my job is to ensure that they do so. The Roman satirist Juvenal's phrase "quis custodiet ipsos custodies?" ["Who guards the guardians?"] is sometimes used by commentators to describe the Ombudsman's role as watchdog, ensuring that the public interest is protected in the actions of Ministers and public servants. What most of these commentators do not quote is the rest of that rather misogynistic extract from his 6th Satire. Juvenal applied the phrase to women and questioned the reliability of guards placed by a husband on a wife to frustrate a lover. I prefer a more mundane description of my role.

As Ombudsman, my job is to vindicate the rights of those who may have been adversely affected by the wrongful action or inaction of the public service and to recommend appropriate redress. In the 21 years of its existence, the Office of the Ombudsman has dealt with over 68,000 complaints and has managed to ensure some form of redress in almost 40% of those cases. My role is also to contribute towards the achievement of a service which is fair and accountable and I work with public bodies to help them change the way they do business so as to provide better service to the public.

As Information Commissioner, I decide appeals in cases where Freedom of Information requests have been turned down or only partly granted. My role is also to promote good Freedom of Information practice and to monitor implementation of FOI by public bodies. As Information Commissioner my decisions are binding but subject to appeal to the High Court. As Ombudsman, my recommendations are not binding but carry a persuasive authority. In both roles I report directly to the Oireachtas on an annual basis, but may also report separately on matters relating to the performance of my functions.

1969 was a significant year both for FLAC and for the institution of Ombudsman in Ireland. When FLAC opened its doors for the first time in April of that year, it was just four months after the idea for a free legal advice centre had been conceived (by David Byrne, together with Vivian Lavan, Denis McCullough and Ian Candy). The labour which eventually produced the Office of the Ombudsman was also in progress at the time but was to prove much more painful and protracted; it was not until 1984 – a full 15 years later – that the Office opened it doors.

In 1966, the then Minister for Finance (and subsequently Taoiseach!) remarked in the Dáil:

> We don't need an Ombudsman because there is hardly anyone without a direct personal link with someone, be he Minister, Dáil deputy, clergyman, county or borough councillor, who will interest himself in helping a citizen to have a grievance examined and, if possible, rectified ...The basic reason therefore why we do not need an Ombudsman is that we already have so many unofficial but effective ones.

This attracted an acidic reply from the doyen of Irish constitutional lawyers, the late Professor John Kelly:

> ... in the large perspective of European social and legal history, this utterance is a fascinating testimony to the survival in 20th century Ireland of the primitive system of clientship and patronage. This phenomenon was, in the distant past, a sure sign of a society where a weak man had no hope of justice without the aid of a strong one, and its general replacement in civilised countries by a regular, strong, and impartial process of law is a major social milestone. It is disheartening to find this primitive doctrine being not alone practised, but also blandly preached from the topmost minaret of the Irish administrative structure.

In the meantime, the institution of Ombudsman had been taking hold in other countries. From its inception in Sweden in 1809, it spread to Finland in 1919. The Danish Office was founded in 1957. The first common law jurisdiction to establish an Ombudsman was New Zealand in 1962. By 1967, the United Kingdom established an Ombudsman, but in the words of the former Northern Ireland Ombudsman, Maurice Hayes: "...with typical insularity, the British rejected the title [of Ombudsman], preferring instead the cumbersome and unclear Parliamentary Commissioner for Administration". By 1969, the Ombudsman for Northern Ireland had been appointed, partly in response to civil rights protests. In the 1969 Devlin report, the question of providing a system of administrative justice had been considered but the creation of an Ombudsman was not recommended. In 1977, an All-Party Committee on Administrative Justice recommended the establishment of an Ombudsman. By 1980, the Ombudsman Act was on the statute books and the first Ombudsman was finally appointed in 1984.

In a commendable exercise, the Department of Justice, Equality and Law Reform recently sought public submissions on outline policy proposals for an Immigration and Residence Bill. In my submission, I pointed out that the Ombudsman Act prevents the Ombudsman from investigating actions taken in the "...administration of the law relating to aliens or naturalisation...". I am one of the few Ombudsmen in Europe whose jurisdiction is restricted in this way. I believe the restriction is unwarranted and that the full range of administrative actions in the immigration and residence area should be subject to investigation by me. My Office receives a small but growing number of complaints in this area; it seems as if the number of such complaints received in 2005 may be double the number received in 2004 (there were 23 in 2004). Typical complaints relate to failure to give reasons for refusal of a visa application, or being given only partial reasons. Complainants rightly point out that this seriously hampers their capacity to mount an effective appeal against the decision. I have also received complaints involving claims of discrimination on race or age grounds. Other decisions are simply arbitrary.

In one case, an immigrant couple, legally resident in Ireland, were planning a holiday with their Irish-born son and two Nigerian-born daughters, aged 9 and 11. They applied for re-entry visas for their daughters. Both applications were refused. On internal appeal (there is no provision for appeal to any independent body in such cases), the 11-year-old's application was granted but her younger sister's was not. It seemed to me that this was an apparently arbitrary decision. It was only after the intervention of my Office that the Department conceded a re-entry visa for the younger girl. Some of the complaints involve, in my view, unfounded assumptions on the part of officials that the complainants or their dependants may be a burden on the state. The complaints also cover the usual range of 'customer service' issues, for example failure to reply to correspondence or delays in replying and inability to contact either the officials or the section dealing with the case.

Despite the bar on investigating complaints actions relating to the administration of the law in this area, my Office conducts a preliminary examination of each complaint in co-operation with the Department. While public assurances have been given that the purpose of this restriction on the Ombudsman's jurisdiction is only to ensure that there is not a duplication of the actual process of administration of the law, and that the jurisdiction of the Ombudsman does extend to areas other than the final decision in the case, there is evidence that the provision has caused confusion both among officials and potential complainants. People have been deterred from approaching my Office and have thereby been deprived of a remedy against maladministration which is widely available to other users of public services.

According to the Department, the overall objectives and principles which will underpin the future immigration system include:

- the protection of human rights;
- ensuring the fair treatment of persons;
- the achievement of reasonable standards of clarity and transparency, and
- the provision of satisfactory standards of service.

I warmly welcome these commitments; my Office is experienced in each of these areas and can contribute to ensuring that the future system upholds these principles. The Department aspires, in its Statement of Strategy, "[t]o provide the framework for ensuring that asylum, immigration and citizenship policies respond to the needs of immigrants, asylum seekers and our society and are line with the best international practices and standards in this area." Best international practice demands the scrutiny of an independent Ombudsman in this area.

Finally, I noted in my submission to the Department that it is proposed that the Bill will respect the principle of ministerial discretion. Discussing review mechanisms, the outline policy document stated:

> The requirements of transparency and fair procedures indicate that there should be a process whereby persons aggrieved by adverse immigration decisions should have the opportunity to have those decisions looked at afresh. It has been suggested by some commentators that review mechanisms should operate by way of appeal to an independent body. However the nature of immigration is that it is ultimately a matter for the discretion of the Minister whether or not a non-national is permitted to enter or be in the State. In such circumstances, appeal to an independent body would be inappropriate.

I do not agree. I repeat that it is fundamental to fair and sound administration that discretionary decisions be subject to independent review. The restriction on my jurisdiction in this area was enacted in a very different Ireland. We were inward-looking; we exported our people and saw homogeneity as a benefit rather than as a disadvantage. One of the most significant changes we have seen in recent years has been the vibrancy, excitement and diversity in all its forms which people – and predominantly young people – both from Europe and farther afield have brought to Ireland. The Ombudsman Act 1980 specifically excluded the laws in this area from the Ombudsman's remit on the grounds that at the time this was mainly a security issue. Despite the best efforts of the Office, and of successive Ombudsmen, this has remained unchanged. I strongly believe that, given its relative accessibility to complainants and its predominantly informal working relationships with public bodies, the oversight of administrative action, which is desperately needed today in this area, is best provided by the Office of the Ombudsman.

I know that many of you here today are primarily focused on use of the legal system and the courts. Only the courts can administer justice, in the full sense of that term. Like the courts, the Ombudsman is concerned with the administration of justice in the broadest sense. The Ombudsman's remit is narrower than that of the courts – confined to complaints made against the public service – and my mode of operation is different to that of the courts - usually inquisitorial rather than adversarial. Many of the issues raised with my Office could, in principle, be taken before the courts. In practical terms, before my Office opened in 1984, such cases were not to any great extent being taken to court. This may be a reflection of cost considerations, access, the need for professional advice and, indeed, the procedural complexities associated with using the courts.

My Office differs from the courts in a number of important respects. Perhaps the main differences are:

- the Ombudsman's method is usually inquisitorial rather than adversarial
- the Ombudsman's service is relatively informal and there is no charge for the complainant (or, indeed, the public body)

- the Ombudsman is often able to invoke a wider set of decision-making criteria, and may often have more flexibility and discretion, than is the case with the courts
- my investigations must be conducted "otherwise than in public", whereas justice must be publicly administered
- the Ombudsman's recommendations are not legally binding but they have a strong moral and persuasive status; in addition to redress for the complainant, they often focus on procedural changes within public bodies and can as a result improve conditions or services for many people.

The Office of the Ombudsman can therefore act to promote social inclusion and can benefit marginalised and vulnerable groups in society and will complement the public interest law approach. You may see the fact that my recommendations are not binding as a weakness. In fact, it is a major strength of the Office. In making recommendations, I rely on persuasion, criticism, publicity and moral authority to have them accepted. This allows the me to operate pragmatically and flexibly and to avoid the legalistic and adversarial approach of the courts and, unfortunately, of many administrative tribunals. We are able to recommend remedies which would not have been given by a court and to hold bodies administratively liable even where there is no legal duty of care or statutory liability. Another important aspect is that the majority of legal claims taken to court are settled out of court without any admission of fault or explanation. There is no assurance to the plaintiff that any action has been taken to prevent recurrence of the adverse action although this is often a matter of great concern to complainants. Many of the Ombudsman's recommendations are aimed at improving procedures and systems.

I accept the reality that rights to housing, healthcare and education may be subject to resource constraints. And, of course, if I am not satisfied with the response of a public body to a recommendation, I may make a special report to each House of the Oireachtas. Thus, the matter comes for resolution before the democratic political process and not the courts.

The process was seen to good effect when my predecessor submitted his special report "Redress for Taxpayers" to both Houses following the rejection by the Revenue Commissioners of a number of his recommendations in an investigation report. The matter was considered by the Joint Committee on Finance and the Public Service which convinced the Minister for Finance that equity required the implementation of all the recommendations, despite the not inconsiderable cost claimed by Revenue. There were two very positive outcomes to the process: First, it demonstrated parliamentary support for the Ombudsman; second, it showed the effectiveness of parliamentary scrutiny of administrative actions.

My Office's report on Nursing Home Subventions described how the Department of Health and Children, when faced with resource constraints, had imposed obligations on individuals in an illegal manner and without legal authority. The Department of Health and Children was in turmoil last year as the consequences of its illegal actions became obvious. I hope that these cases and their aftermath will have focused the minds of public servants on the necessity to act within the law and with proper authority. My Office has received complaints from people with disabilities who have been refused grants, on grounds of age, to modify their homes to cater for their needs, even though the relevant scheme contained no age restriction. We are successful in resolving these cases to the satisfaction of the complainants, but they surface time and time again when resource constraints lead public bodies to ration entitlements in a manner which is not in keeping with the regulations. An investigation concerning tax reliefs for passengers with disabilities resulted in thousands of cases being reviewed by the Revenue Commissioners and payments of approximately €900,000 being made to some 100 carers.

My Office will continue its work in these and other areas. I look forward in particular to the impending extension of jurisdiction to all health agencies and to the disability area. I also hope to continue to develop relations with legal practitioners in the public interest law area. We have much to learn from each other.

Using Law and Litigation in the Public Interest

Michael Farrell, Senior Solicitor, FLAC

Do we really need Public Interest Law and Litigation in a state which is now one of the wealthiest in the world?

Three weeks ago John Lonergan, Governor of the country's largest prison, wrote in the Irish Times that, despite our new found prosperity, "there are thousands of our people, young and old, living in dire poverty and totally alienated from mainstream society … The more wealth we generate, the more widespread inequality becomes".[1]

He should know. Many of the casualties of our unequal society end up in his prison. Others are found in grim and inadequate mental hospitals, neglected geriatric homes, desolate, drug-ridden housing estates, road-side halting sites, or fighting for proper education or treatment for their children with disabilities. Others such as gay couples or transsexuals suffer discrimination and social exclusion through ignorance and prejudice and laws inherited from two centuries ago.

This should not be. We have a Constitution with an inbuilt Bill of Rights, including unenumerated rights that the Supreme Court in an earlier and more active phase read into that Constitution. In addition, Ireland has now signed up to most of the major European and UN human rights conventions that protect a wide variety of rights, both civil and political, and economic, social and cultural. These rights should be tools to enable the poor and marginalised to get better accommodation, better education, better health and social welfare, and to find remedies when they are unfairly treated by the powers that be.

But how can vulnerable and disadvantaged people access these rights? First of all they need to know about them. Then they need organisations and structures and usually professional legal assistance to vindicate those rights or to change the law when it does not adequately protect them. And, of course, they rarely have the money to pay for the research and legal fees that may be needed in order to go to court.

That is where Public Interest Law and Litigation comes in, together with structures to deliver it.

Mel Cousins in his paper rightly says that litigation and legal education designed to protect the rights of vulnerable people should be funded by the civil legal aid scheme, and indeed this has happened to a limited degree in the UK. However, FLAC has recently published a study of the civil legal aid system in this jurisdiction, entitled *Access to Justice: A Right or a Privilege?*, showing that it is seriously underfunded, operates an impossibly low means test threshold, confines itself almost exclusively to family law cases and is legally barred from taking test cases.

We will be campaigning to change that, but even if we succeeded overnight, the legal aid law centres would probably still have to devote the vast bulk of their time to individual case work, vitally important and necessary for the particular clients involved, but not intended to change the law or widen the spectrum of rights available to the socially excluded. And it is arguable that a wholly government-funded body like the Legal Aid Board would always be subject to subtle, or not so subtle, pressures if it took too many cases that significantly challenged government policies or were likely to cost the government a lot of money.

We also have, of course, the Equality Authority, which does take test cases very effectively and engages in public legal education but its remit is limited to discrimination issues. So there is a

need to develop independent structures to take a wide range of public interest cases on a strategic basis and to carry on campaigns of community legal education and lobbying for legal reform. Mel Cousins has also rightly pointed out that litigation should be only one part of any strategy to assert the rights of the disadvantaged, but it is frequently a crucial part and, as Mel has also noted, even unsuccessful cases can play an important role by highlighting injustices and sparking demands for change.

It is, of course, important to say at this stage that public interest litigation is not new in Ireland. Solicitors and barristers here have been taking cases that affect the public interest, and particularly the interests of disadvantaged and marginalised communities or vulnerable minorities, for many years. And a lot of the time they have taken such cases on a *pro bono* basis or at least on the basis that if they got awarded costs at the end of the day, it would be an unexpected bonus.

Such cases go back to *Ryan v The Attorney General* in 1965, *McGee v The Attorney General* in 1973 and *Airey v Ireland* shortly afterwards, and include many cases on Travellers' rights and disability rights in the intervening period. Some of the lawyers who took the more recent cases at little if any gain to themselves are here today and we should pay tribute to them. And, since I have only very recently taken up my present position with FLAC, I can also say without embarrassment that FLAC itself has taken a significant number of groundbreaking cases over the years as well as being involved in public legal education and lobbying for legal reform.

But every lawyer in private practice who has taken public interest cases for clients without means knows the feeling of having to spend hours at the end of a busy day, at night, at weekends or during vacations working on those cases because the rest of the time has to be spent earning a living and being seen to pull one's weight in the firm. And most of us have had plenty of cases where there was a point that we would have liked to pursue, or an anomaly or injustice we would have liked to challenge, but we simply could not do it because of the pressure to get on with the case – and dozens of others – and to get the best possible outcome for the particular client, not necessarily for the class of people who might be affected by the point at issue.

The type of public interest litigation taken so far has usually been piecemeal, unplanned, even haphazard. It has depended on cases that raise important issues coming in the door, and on the clients wanting to litigate those issues, not just to settle, quite understandably, for the best deal that is on offer for *them*. The results of such cases can be haphazard as well. Even if the issues are thoroughly ventilated in the case, there may be no change in the law or policy unless work has also been done to raise public awareness and create a demand for change.

An example is the *Norris* case on gay rights. Even after a comprehensive victory in the European Court of Human Rights in 1988, it took another five years of awareness-raising, campaigning and lobbying to secure the repeal of the Victorian legislation banning gay sex between consenting adults.

There is also a mismatch between the justice system and those who are victims of unfair policies, prejudice or official neglect. Poor people are often afraid to go to solicitors or, if they do, the firms they go to are usually small and may not have the expertise and resources to take on major test cases. Larger firms might be willing to take such cases or support them but usually they have no contact with the people concerned. Barristers are at another remove again, and court rules and procedures are not exactly welcoming to indigent litigants.

And we might as well face the fact as well that the public image of the legal profession has been badly tarnished in recent years and for many it is not the first place they would think of going to seek help in vindicating their rights.

So we are talking about access to the law for the vulnerable and the voiceless and about a strategic approach to litigation that targets specific injustices or abuses and seeks out cases through which to challenge them. And there is also, of course, the need for legal education and awareness raising, both in deprived communities and for the public at large, so as to create a climate of opinion that will support change.

There is a range of models for meeting this challenge, using, for example, specifically legal NGOs like FLAC that will concentrate on test case litigation and public legal education; community law centres like Northside and Ballymun in Dublin, which have worked for years in deprived communities, under very difficult circumstances and constantly short of money, striving to raise awareness of legal rights and entitlements and taking cases arising out of those communities; NGOs serving particular disadvantaged groups like Travellers, asylum-seekers, or people with disabilities, and who have decided to pursue a legal strategy as well; and law firms, big and small, and barristers, who are willing to engage in or support public interest litigation.

None of these models is exclusive and none of them can satisfy the full range of unmet legal need. All of them have a potential part to play. And there is also a need to change court rules and procedure to allow and facilitate the taking of test cases and class actions, to give *locus standi* to NGOs acting on behalf of vulnerable groups; and to develop protective or pre-emptive costs orders and other procedures to reduce the threat of financial ruin for those who take on public interest challenges.

In that context it is encouraging to see that the courts and the Law Reform Commission have recently taken some steps towards making court procedures more accessible by allowing the Irish Penal Reform Trust to represent particularly vulnerable prisoners and by making proposals to facilitate class actions on behalf of groups of people affected by the same policy or practice. However, we are still quite a way behind even our nearest neighbour in the UK in making the courts more receptive to public interest litigation.

One major step forward that has been taken is the partial incorporation of the European Convention on Human Rights into Irish law. The European Convention on Human Rights Act 2003 has provided a potentially very powerful instrument for vindicating the rights of the vulnerable in our society. As is the whole range of other international human rights treaties and conventions that we have signed up to create new tools for defining and enforcing rights, both by making submissions to the international bodies that monitor Ireland's compliance with its obligations, and by taking cases to international fora. But to seize this opportunity requires the development of expertise about these international instruments and money to fund research and litigation as, with the exception of the European Court of Human Rights, there is no legal aid for using any of these international mechanisms. And the legal aid for the European Court would just about pay for a train fare to Strasbourg.

The need is there for a major expansion in public interest law and litigation and in our increasingly wealthy society the resources should be there as well. Mel Cousins' paper looks at some ways of meeting this need and we have also had the opportunity today to share and learn from the experiences of lawyers working in other countries which are well ahead of us in devising structures to deliver public interest law to deprived and excluded communities. Hopefully we can appropriate elements of best practice from all of them.

Funding is a major issue, especially for the legal NGOs, but one message that has come across clearly from several different models of organising public interest law is the importance of tapping into the resources of the legal profession to support this work. We in FLAC must of course acknowledge the generous contribution made to our budget annually by both solicitors and barristers. But law firms have the capacity and, I hope, the willingness to contribute more, whether by taking on cases themselves, seconding personnel to work with legal NGOs, or funding particular cases or campaigns of public interest legal education.

And this does not have to be an entirely disinterested exercise. Experience elsewhere has shown that involvement in public interest law is good for law firms. It gives their staff valuable experience and stretches their capabilities, it is in a good cause, and it is good for the company's image in an era when lawyers are not the most popular and highly regarded professionals around. So one of the lessons we can take away from today's conference is that we need to devise structures, whether based on the Australian model or otherwise, to try to involve law firms in the delivery of public interest law.

That will not solve the financial problems of the NGOs who must also play a leading role in the delivery of public interest law, but there are a number of possible funding sources that could help to put them on a more secure footing. The legal professional bodies could make a direct contribution in addition to the contributions already made by individual members. If the ban on the Legal Aid Board taking or funding test cases was removed, it could contract out work to the NGOs as the legal aid bodies do in Britain. And, hopefully, other bodies interested in promoting social change will see the value of strategic litigation and public legal education and commit some funding to it.

This conference has been intended as a beginning, the start of a serious discussion on public interest law and litigation in Ireland. It has packed in a lot of information in one day and there will not be time to assimilate it all or to tease out the implications of the various models in the limited time available for discussion today, much less take decisions about future strategy. But the take-up for the conference indicates a widespread recognition that public interest law and litigation can make an important contribution to accessing justice and ending social exclusion in Ireland today.

We do not want this to be just a theoretical discussion and we are anxious to maintain the momentum the conference has generated. Noeline Blackwell, the Director General of FLAC, will outline some suggestions for following up on today's conference in her closing remarks.

In conclusion, I have focused in this paper largely on the continuing deprivation, inequality and social exclusion in our increasingly wealthy society and on the role of public interest law in helping to end that deprivation and exclusion. But lest that seem too negative an approach, we should also stress that the combination of fundamental rights provisions in the Constitution, the incorporation of the European Convention on Human Rights into our domestic law, and the international conventions we have signed up to, provide the basis for building a society firmly founded upon human rights and where all public policy decisions should be proofed beforehand for compliance with our human rights commitments.

For the first time too our economic prosperity leaves Government with no excuse for failure to comply with those commitments. And we as lawyers have a golden opportunity to contribute to the building of that inclusive, rights-based society.

1 'We have failed miserably to create a just, fair and equal society', John Lonergan, *Irish Times*, 24 September 2005.

Strategies for promoting social inclusion through Public Interest Law

Prof Gerry Whyte, Trinity College Dublin

In responding to Mel Cousins' comprehensive report on Public Interest Law and Litigation in Ireland, I would like to make two points.

1 PIL and the inevitability of politics

First, the existence of Public Interest Law (PIL) is a symptom of the failure of the political system to address adequately problems of social exclusion. People turn to the law when they lose faith in politics. Therefore it is not enough for politicians like the Minister for Justice, Michael McDowell, TD, simply to decry this reliance on the law as a means of securing social change. If he is concerned about the courts becoming embroiled in debate about public policy on social inclusion, he must ensure that the political system effectively addresses the needs of those members of our society who have not benefited from the Celtic Tiger.

The origin of PIL in the inadequacies of our political system has a lesson also for public interest lawyers. The problems that we seek to address are, at their root, political problems and therefore can be comprehensively addressed only through politics. Public Interest Litigation on its own is not capable of promoting social inclusion. Based on my research in this area, I have come to the conclusion that the principal value of Public Interest Litigation is that it can provoke the political system into responding to a problem that the system has hitherto ignored. It follows, therefore, that public interest lawyers working with those seeking social change should not restrict their efforts to the use of litigation only but that they should also be prepared to assist their clients in shaping the political response to the litigation through lobbying, media briefing, etc. I very much welcome the fact that the recommendations made by Mel Cousins reflects this holistic view of PIL and that, in addition to recommendations in relation to the support of public interest litigation, he also advances very useful proposals in relation to law reform, legal education and community legal education.

2 PIL and the role of the Law Schools

Second, as an academic working in this area, perhaps I may be forgiven if I address one particular aspect of the Public Interest Law movement that is close to my own heart, namely, the role of the Law Schools.

In considering the future of PIL in Ireland, the following features of PIL in this jurisdiction should be borne in mind. First, PIL is relatively new and underdeveloped here. In particular, there is a relative paucity of superior court judgments and academic analysis of Irish PIL is also in its early stages. Second, there are relatively few practising lawyers dealing with PIL and most of them are employed by the six constituent units of the Independent Law Centre Network. The situation is not much better on the academic side. A quick review of law school websites indicates that PIL is taught in only two Irish law schools (Trinity and Galway), though the cognate subject, Welfare law, is taught at Cork which also has a research cluster on Law, Inequality and Social Exclusion, while Galway also has a strong profile in Disability Law and Housing Law. In all, there would appear to be fewer than a dozen academics spread over three of the country's University Law Schools actively working in PIL and cognate subjects. Third, we know that senior members of the judiciary oppose reliance on the courts in order to compel the legislature and/or executive to formulate new policy for the vindication of socio-economic rights and this attitude throws a shadow over the legitimacy of PIL generally.
This analysis of PIL in Ireland provokes the following comments:

- First, Irish lawyers working in this area would benefit from having access to comparative developments in PIL worldwide. This would enable them to draw on a broader base of caselaw and experience when formulating arguments and tactics for use in the Irish context. Exposing members of the judiciary to the experience of PIL in other jurisdictions would also promote its legitimacy at home. However, given the pressure under which lawyers in the not-for-profit sector work, it is unlikely that they could devote much time and energy to research either on PIL in Ireland or in other jurisdictions. This type of research is best carried out in the law schools, where the researcher would have both easy access to appropriate resources (including colleagues working in cognate fields of study) and, most importantly, the time in which to pursue such research.
- Second, as already mentioned, relatively few Irish academics pursue research interests in PIL and there is a pressing need to build up a critical mass of researchers in this area. Such research is necessary in order to assist practising lawyers working in this field and also to provide an ongoing evaluation of the impact of PIL in Ireland.
- Third, the development of PIL research in an academic setting would promote the legitimacy of PIL by identifying it as a subject worthy of research and also by exposing future generations of law students to this area of the law. Thus future lawyers would become more comfortable with PIL just as, within living memory, both family law and EU law have become routine areas of legal study and practice.

Therefore, in prescribing a role for law schools in the future of PIL, one would begin by insisting that PIL be provided, at least as an optional subject, on the curriculum offered by every law school in the State. This would ensure that future generations of law students would be exposed to PIL during their academic training and hopefully this would attract some of them to working in this area. One would also envisage more formalised contacts between academics and practitioners working in the area of PIL, especially those working in law centres, with the academics providing a valuable research resource for the practitioners, keeping them informed of national and comparative developments and researching particular issues as the need arises. Such a development would also reinforce attempts at university level to make legal education more accessible to individuals from marginalised communities, many of who would find PIL of particular relevance to their personal experience. It would, moreover, send a clear signal to the profession and the wider community about the legitimacy of PIL.

In this context, I very much welcome the recommendation in the Cousins Report for the establishment of a Centre for Public Interest Law that would engage in research in this area, liaise with PIL practitioners and promote education in PIL for law students, lawyers and local communities. I sincerely hope that this forms part of the important deliberations and planning that should follow this conference.

Conclusion

In December 1968, a law students' conference on legal education was held in Trinity College Dublin. The most significant consequence of that conference (though probably unanticipated by the organisers) was the establishment of FLAC by David Byrne, Denis McCullough, Vivian Lavan and Ian Candy. This marked the beginning of a sustained, systematic attempt over more than three decades to use the law in a strategic manner to tackle social exclusion in Irish society. In the face of overwhelming odds, FLAC and its sister organisation, the Coolock Community Law Centre, made a very significant contribution to the development of Irish law as it affects marginalised individuals and communities in this country. Of late, there are encouraging signs of a growth in the NGO sector committed to a strategic use of the law to promote social inclusion and the present conference is most timely, indeed, to catch the tide of this development and to plot a way forward for this movement. There is every reason to believe that this conference on Public Interest Law will prove to be just as important in harnessing the law to promote social inclusion as was its predecessor on legal education almost thirty seven years ago.

Questions and Answers

Donncha O'Connell, NUI Galway

I am Donncha O'Connell and I am from NUI Galway. We have three interlocutors: Maura McCallion from the Northern Ireland Law Centre; Kevin Brophy, who is a private practitioner and who has done extensive work with regard to Traveller rights; and Dave Ellis, who is a social policy researcher and who is known to many people involved in activism for years. We were also to be joined by Eilis Barry, the legal advisor to the Equality Authority, but Eilis is unfortunately unwell, and we are very sorry she cannot be here because she is one of the key members of FLAC for many years and she is one of the foremost public interest litigators in Ireland in her work for the Equality Authority.

We also have the various speakers of today and Mel, who has authored the report which is the subject of this conference. The purpose of this panel is to allow the interlocutors to give perspectives from their experience as people working in Ireland in the areas that the international speakers have discussed. It is also desirable for all the audience to participate in this and, with that in mind, we asked people to submit some questions We are also going to invite people to offer questions or comments from the floor. We are however tied for time and the organisers have asked me to indicate that there will be workshops in the coming months and other opportunities again to discuss some of the many issues of importance that have been raised at this conference, some of them for the first time, and there will be possibilities again to discuss these at workshops organised by FLAC and other organisations in the near future.

I wish to give the first interlocutor, Dave Ellis, the opportunity to make a few comments. Then we might invite a question or two from the audience. I am asking the panellists to note themselves if the question is directed towards them and then at the end I am going to ask each of the panellists to come back briefly and respond to whatever is directed towards them or if there is any specific question directed towards them.

Dave Ellis, Community Legal Resource:

Thanks Donncha. I want to give you the perspective I am coming from: I work for an organisation called Community Legal Resource which is a co-operative of lawyers, paralegals and people with a range of other skills who seek to provide groups in the community, voluntary and not-for-profit sector with a legal resource in a holistic manner. That means we engage with a wide range of community groups in relation to training, research and support. That brings me to two of the issues that Mel has mentioned in his report: community legal education and also helping groups in terms of law reform.

Before mentioning two questions that have come from the floor, if I could throw in my small question to which people on the panel might like to respond. From my experience, community groups and Citizens Information Centres are often very much aware of the possibility of a legal solution to the problems that are coming in to them. They are working on the ground and they are aware of this, but they have very little idea exactly where to go. A number of speakers have mentioned, which I think is really important, the building of a coalition or a grouping between lawyers, paralegals and groups working on the ground so that there is a way in which information can go from one to the other in as seamless a way as possible, and I would be interested if the panel had any ideas on building that type of coalition.

Two of the questions that have come from the floor are firstly from **Christopher Robson from Gay and Lesbian Equality Network (GLEN).** He asks: The potential for success from test case

strategy seems huge, what about the downside if cases are lost – is there a valid apprehension that a setback may occur which may prevent advances in that field, possibly for years?

The other question is from **David Malone of Euro Law Environmental Consultants:** Is there a need to integrate economic, social and environmental issues when preparing a court action? And the whole issue around expert evidence.

Donncha O'Connell:

I am going to ask Joe Noonan from Cork, who has submitted a very interesting question, to put it forward.

Joe Noonan Solicitor:

Just to say on behalf of those of us down here that there is a great sense around the room of gratitude to the organisers, FLAC, and to the funders. It has been truly a very inspirational day.

I have a question about defending the judges. Just to say to our international visitors, I think public interest litigators in Ireland face quite a hostile political climate at the moment and I think you need to be aware of that. For example, one government minister recently branded a successful public interest litigant as 'robbing the public' – this was after he had won the case and the government had been shown to be wrong, and the Minister in question felt free to defame him in this way. Unfortunately, that is not exceptional, nor was it criticised by anyone else in government. So we have an attitude problem. This is combined with the real issue, with which you would be familiar in your own jurisdictions, of the 'government gift', which is that judges are political appointees and judges depend on government favours for promotion after appointment, and that is a real issue. Of course, that is not to say that government appointees are always weak or poor appointees and we have seen our Chair earlier today and the Ombudsman as two people who embody that fact.

Given those atmospherics and given the reality of the career issue, I suspect it can't be easy for a judge in that context then to deal with a challenging public interest issue. The whole issue of whether it is a legal or a political question is often seen as out. So my question is, from your experience, how can we as lawyers assist the judges in protecting the dignity and the independence of the judiciary, which if we lose it, would be to lose the cornerstone of any hope for public interest law?

Donncha O'Connell:

I think that raises a very important question and one that has not been addressed directly today.

Roger Smith, Director, JUSTICE:

You have raised a very important issue and it is exactly the same issue that has been raised in England and Wales. We had a very bullish Home Secretary, David Blunkett, who had to resign over a misunderstanding about his travelling expenses. There was a rumour of a Minister that was said to be him, who called the Lord Chief Justice at the time a 'senile old man' and he indulged in similar verbal attacks on a judge, Mr Andrew Collins, who had decided against the government in a series of asylum cases. So that hostility is very alive and the Human Rights Act has added to that. The Americans have Congressman Delay, who has currently also resigned under a bit of a cloud – perhaps there is a god above who wreaks a little vengeance when politicians strike too far. At one level that is the sign of a healthy polity and we should not be too apologetic about it and it indicates that the judges are standing up and that the politicians are taking notice.

We are in the process of removing political appointment on the basis that Article 6 of the European Convention and a case involving Guernsey, *McGonnell*, require it. We are in the process of setting up a judicial appointments commission and the Lord Chancellor, who once strode across any notion of the separation of powers in England and Wales, is no more in relation to anything, but title. So I think if you incorporate the Human Rights Convention as

you have done, down the tracks you have to look at how you appoint the judiciary and that has been an issue. In Scotland they had to stop temporary appointment of Sheriffs, the act came into force slightly earlier in Scotland than in England. In England there will be this major shift as we move to the Judicial Appointments Commission. I think, in terms of the independence of the judiciary, the incorporation of the European Convention can be used to attack that directly and it is a position in which – and this is a three-cornered battle between politicians, judges and the public – that politicians sometimes assume the public are with them when they attack the judiciary, while that is often not the case.

Donncha O'Connell:

I want to go to the second interlocutor, Kevin Brophy

Kevin Brophy:

I am one of the sole practitioners, so therefore money is the subject closest to what I will be talking about. The first thing I would like to say is that I think every solicitor should be made to attend one of these conferences at least once a year. Certainly for me it reignites my enthusiasm and it makes me think again about the reasons why I became a solicitor in the first place. Public interest litigation is something that very few solicitors get involved in and I am absolutely convinced that it is not that they don't care, it is because they don't know how to and they do not have access to the type of information that they would need. I would hope that a public interest organisation is set up so that that situation will change.

My firm has worked quite substantially with Travellers over the years and, more recently, in asylum, immigration and migrant rights cases, and money is a major problem. In many cases I am prepared to work without any substantial fees, but I do have difficulties with most of these cases; by the nature of them, I have to stop [other] work and work on them immediately because if someone is going to be evicted or if someone is going to be deported, it is generally going to happen within twenty-four hours or in the immediate future. So I have to call on a range of experts to provide their help – be they engineers, architects, doctors, or barristers – and cannot ask them to do it for nothing. I think it is critical that there is some form of financing for these types of cases.

The first financial question that I would like to address to Mel would be to do with his contact, with the Department of Justice. I am asking this already knowing the answer, which is what all good legal people are supposed to do. I cannot imagine, given the government's attitude to FLAC or to the Legal Aid scheme, that there is going to be any remote help from the government. Did Mel get any idea from his contacts with the Department of Justice that it would be anything other than a nominal contribution towards setting up an organisation based on Public Interest Litigation?

Mel Cousins:

I did not specifically raise with the Department of Justice whether they were likely to increase their funding dramatically for legal aid. But I would suspect that, as Kevin probably knows, it is unlikely that the government is going to fund specifically organisations to take on Public Interest Litigation in the context of the funding that they provide for the Legal Aid Board. Having said that, the people I met in Government were quite positive about the research and they did indicate that they would be favourably disposed to looking at funding if it came within something that they were already committed to. You certainly could see aspects of a Public Interest Law approach being funded by different sections of Government. Community Legal Education, for example, is an obvious area where you might reasonably expect Government to provide some resources. I would not be expecting the majority of funding for an overall package of measures to come from Government but I think there is some potential there for aspects of it.

Anne Colley, Chairperson, Legal Aid Board:

Thanks very much for the opportunity to say a couple of things about the Legal Aid Board, of which I'm Chair. I would certainly agree that there has traditionally been a reluctance for the state to fund legal aid and since the *Airey* case, civil legal aid has been available but on an avowedly restricted basis and I do not think we could even argue with that. In addition, our difficulties have worsened in the last couple of years because we had real financial difficulties and we had long waiting lists and long waiting times, about which the Board was very concerned, but I have to say that a major concerted effort was made on the part of the Board, together with the prospect of an adverse decision in the *O'Donoghue* case which, in fact, came not for us but for the State, meant that we got extra funding this year and it has immeasurably altered our position. Just to give you a very quick flavour of the waiting times, in December 2004, seventeen of the thirty Law Centres had waiting times for appointments of between four and seventeen months. That does not account for priority cases which obviously get dealt with earlier. Major delays then. But in August 2005, in eighteen of the 30 centres, waiting times were two months or less and twelve of them were between two and four months. In fact you can see there was a reduction from somewhat over 3000 people waiting to just over 1000, clearly that has been a major improvement. This was also the result of being able to employ private practitioners, both for the District and the Circuit Court, and those are back now in being.

In addition we are responsible for the Refugee Legal Service. I noted there was discussion about Judicial Review cases, in fact we have taken approximately 130 Judicial Review cases in asylum cases up to 2004 and most of them have been settled, which speaks for itself as to why we took them.

The Board certainly shares most of the concerns that were expressed here today in relation to *effective* access to justice and not just access. It is currently making representations to the Department of Justice regarding changes to the structure and to the operation of the service.

We are also having meetings in the next few months in which a number of things will be discussed and I will give you a flavour of them. For instance there will be defamation cases, which are excluded at the moment. There are obviously ECHR implications and we have to look at that but that also leads to the need for legal aid to be granted where the interests of justice requires it and also where the issues are such that legal representation is necessary to ensure effective access. The means test will be looked at again which has not been looked at since 2002 and which was based upon 2000/01 figures. We will be looking at the removal of most of the current list of exclusions and developments from new legislative initiatives such as the proposed ASBOs or indeed the Private Residential Tenancies Board and the issue of representation for children and guardians *ad litem*.

I think that gives you a flavour of the feeling that we are moving forward and I think we would like to be joined with the people here who are looking for effective access to justice and certainly if this seminar is anything to go by, if Public Interest Law has its aim of the promotion of social inclusion through offering that effective access to justice, we certainly see our role in using our resources within the legislative requirements to do so.

Other questions from the floor:

Q. We heard a bit about Iraq a little earlier on today and I want to point out to the group here there is a very interesting Public Interest case in the Four Courts here in Dublin. It is to do with a group of five young people who damaged a plane in Shannon and the plane, which was carrying troops to Iraq, had to go back to America. They did it in protest at our support for the illegal invasion of Iraq. Presently they are looking for support to assist them in this case, they have to bring people from America and other places as witnesses, they have a number of websites: Dublin Catholic Worker or Ploughshares Dublin and you can find their sites and find out information on how you can support them.

Q. It struck me that we are, as members of the public, asked to assist marginalised communities. Has anyone ever asked the public to contribute to a Public Interest Liability Fund?

Donncha O'Connell:

Maybe some of the visiting speakers will want to address that in their response later.

Kevin Brophy:

On the financing front again, Martin Coen asked a question about a comment made by Julian Burnside this morning, about the possibility that practitioners might get a tax deduction instead of a payment if they do get involved in Public Interest Litigation. Perhaps one of the other speakers could comment on whether there are any such systems around the world that anyone is aware of, where something of that nature might be in place.

Donncha O'Connell:

Julian Burnside will address that when he responds

Vinodh Jaichand, Irish Centre for Human Rights, NUIG:

Prior to joining the Irish Centre for Human Rights – I am a South African, I worked for Lawyers for Human Rights in South Africa, another NGO that dealt with Public Interest Litigation issues. We had thirteen offices around the country with more than 100 staff. Of that 100 staff, we had at least 30 lawyers. When I joined the Irish Centre for Human Rights, I investigated the possibility of setting up a Public Interest Litigation unit at the centre itself, but discovered a number of obstacles.

The question I would like to ask of the legal profession today is: What obstacles are there in the rules of practice, of the Law Society or the Bar Council in Ireland, that are likely to impede the act of flourishing of Public Interest litigation, when NGOs hire staff lawyers for litigation? Can the representatives here today tell us what steps are being taken to remove any of these obstacles if they are around?

Maura McCallion, Law Centre Northern Ireland:

Our organisation is a regional Law Centre and we work with membership organisations that are community advice centres. What I have heard from the speakers is the importance of communication, and again this is key to our experience, making sure you can work with people and get the cases and the individuals aware of their rights. I think the issue is particularly about making sure litigation in the area of social and economic rights is seen as a legitimate remedy; I think that is the big message that we still have to get through, both in the judiciary and in the community.

I have a question regarding the use of academic lawyers and comparative analysis: Are there any examples of where that has been used?

Questions from the floor:

Marie Quirke Solicitor, Law Centre, Finglas:
For Robert Garcia: how important is empirical research in your court successes and how difficult is it to get that research and what weight does the courts attach to the research?

Stuart Stamp NUI Maynooth:
Do you see a role of developing paralegals in advocacy in Ireland and if so, what are the barriers and how might these be overcome?

Davy Joyce, BL, ITM Legal Unit:
There was a comment from Mr Budlender that was of interest to me, in relation to the relationship between a specialist public interest law centre and community law centres at the local level. They are, effectively, the organisations that are dealing with the volume or the high turnover of advice work or work coming in that may not always end up in setting precedent or creating major change, but it was commented that this is an important area in terms of public interest, that the volume of work is maintained. I am just wondering, and I know Mr Budlender is not on the panel, but maybe the speakers would have a similar opinion on it: in terms of having a specialised public interest centre in Ireland, how are relations maintained, managed and enhanced, between that type of centre and community-based law centres or community advice centres, especially given the lack of finance?

Robert Garcia, Center for Law in the Public Interest:
As I understand it, your question is "how important is our research to our work?" and I think that goes back to the other question about tying in economic, environmental and social justice issues. The bottom line is that we cannot succeed without extensive multidisciplinary research and analysis. Let me give you a simple example. In *Brown v the Board of Education* in 1954, where the US Supreme Court held that segregation is inherently unequal, that decision was based in part on a study done by a black psychologist concerning black and white children playing with dolls and he found that both black and white children preferred white dolls to play with and shunned black dolls. Which suggested that both white and black children attached greater value to white life than black life, and that it was more attractive. That research made it into the US Supreme Court decision and was part of the published decision.

Fast forward to what we do in Los Angeles now and the type of research we need to be doing about New Orleans. The US Supreme Court has held that in order to prove intentional discrimination, because they do not have signs anymore that say, 'blacks only' in parks or in schools, four types of evidence is looked at by the courts; i) the impact of an action, numerically people of colour suffer more than non-Hispanic whites, ii) the history of discrimination, iii) procedural irregularities on how a decision was reached and iv) substance of irregularities. We take that very seriously, whether we are going into court or whether we are going to persuade a newspaper or a politician or anybody else. We think long term if we have to go to court we are going to have to prove this but more importantly the same kind of evidence is as persuasive in the court of public opinion as it is in a court of law.

We have extensively researched the history of Los Angeles from 1850, when California became part of the US, to the present. The fact that there are fewer parks in communities of colour and more parks in non-Hispanic white parts of Los Angeles is not an accident of unplanned growth. Los Angeles pioneered the use of racially restrictive covenants and housing. Throughout most of the twentieth century you could not, if you were a person of colour, buy a house in Los Angeles except in the black part of town, if you were black, or the Mexican part of town, if you were Mexican, or a Chinese part of town if you were Chinese.

We researched that there have been three major books that have come out recently. We commissioned a report by a professor in Utah on the history of racial discrimination in the

provision of parks and recreation in Los Angeles in the twentieth century. So a Supreme Court decision can directly make that relevant. When we use it in court, in another case that I then talk about it, was criticised as being too open, the fact that there was discrimination for so long ago, that does not matter any more, well of course it matters, because the US Supreme Court says it does.

As I mentioned, George W Bush, in his remarks to the nation after Katrina, specifically said we recognise the fact that poor black people suffer most from Katrina and it is a continuing part of racial discrimination for generations. It is something we need to come together on to overcome the inequities of the past. I do not read Supreme Court cases anymore, I have first year Law Students who read them and summarise them for me because they are not going to help me, because what nine white people in Washington say does not matter to me. But I read every book that comes out about the history of Los Angeles and every book about the sociology of discrimination.

Julian Burnside QC, Melbourne, Australia:

Two things: Firstly, the plight of the sole practitioner with urgent cases that come along, I have experienced this. As far as I can tell, everyone in detention centres knows my mobile number and I get a torrent of requests for help. That is why I have set up this group called Spare Lawyers for Refugees and I will suggest it to you as a model that you may think about. It is simply an informal group of people that are willing to take *pro bono* cases in the relevant area. We have an unpaid co-ordinator who farms them out. She rings around until someone says, "Yes, I am free at the moment, I will do that case". It is a zero-cost exercise and we have been able to get someone to handle every single case.

Second, the tax deductible scheme. I am not aware of it existing anywhere, its chances of getting up in Australia are fairly limited because I suggested it!

Can I respond to the observations from the head of legal aid; I think it would be a good idea, governments are always complaining about the costs of legal aid, we can understand that. But I wonder if governments consider the costs of not providing legal aid and the cost of not supporting Public Interest Litigation. The obvious cost of not providing legal aid is the burden on the court system of unrepresented litigants, which is a really serious problem. This is not only because it slows things down and ties up judicial resources, but also it can very often in an adversarial system lead to defective results which are then subject to appeal and potentially subject to a rehearing. So you can have two or three goes at the same exercise, simply because someone was not prepared to help a litigant be represented first time around.

Second, and this is especially so of Public Interest litigation, any society is going to pay a substantial but unquantifiable cost if there is a growing group of people who have a well-founded sense of grievance because they have been denied effective justice. Just because you cannot put a money value on it, it does not mean it is free of cost.

I think that governments need to attend to the idea of the cost to them and to society of not funding legal aid and Public Interest Litigation adequately.

Ellie Venhola, Community Legal Clinic, Ontario, Canada:

I have got three very quick points. In relation to the information provided by the head of Legal Aid – have your Legal Aid call our Legal Aid because we don't have waiting lists, we don't have a lot of funding, salaries for staff lawyers and clinics have been frozen for five years. But we still manage to see clients in the clinic, we see about 4000 clients in summary advices alone per year. Whoever calls is seen within twenty-four hours. So something works there.

With respect to judges and the expressed concerns about a hostile reception, I would suggest two things. Invite judges to participate in the Public Interest Law work that you are doing, and include the government. We do both and even though the government may be the opposing

party 95 per cent of the time, we find that once you buy into the ethics of what you are doing, it is much harder on the bench to turn around and try to destroy that. Secondly, if that does not work, what you want to do is find a really clear case with good facts and good law to go to court and if you lose, you then take that to the media. You engage the Bar Associations, NGOs and FLAC to write a report and present that to the media, not on what the judge did but on what the case said and how that was ethically, morally, politically incorrect and judicially a bad decision.

Finally with financing, just a couple of things, the tax reduction idea was wonderful and probably more suited to larger firms than sole practitioners. What our Legal Aid does, in Ontario, is provide a test case funding bank account, Lawyers as practitioners have to be licensed and so part of my licence fee goes into the Law Foundation of Ontario who along with the Law Society and Legal Aid Ontario produce this fund so that private practitioners who may need these resources may apply to that fund for test case funding.

In addition, we try to work in groups, so we have a group of at least ten clients. If it is a large group we ask for disbursement funds from them as they can afford it. You would be surprised how much in kind or in cash these families come up with even a little bit of money, and that helps towards the disbursements.

In terms of financing private law firms, we will foot the bill. The way we work it is, they give us the resources, the photocopying, the researchers we need. We go to court, we win, we bill them for our costs, they bill us for their costs. It is an interesting situation. The court awards costs either to one of us or both of us and since we are not allowed to accept costs under our legal aid legislation, we forward those costs in payment to the private Bar firm for their *pro bono* work, which is actually billed. They then donate our billing as a donation back to us. And boom! We fund the next case.

Roger Smith:

What is a major quality for a test case litigator? Aggressive mind, intellectual approach, restraint and caution, you can mess things up big by taking the wrong case, There are examples from the UK, you really have to look at a case upside down to make sure that if you lose it, it does not go backwards.

Donncha O'Connell:

Ladies and gentlemen, thank you very much and thanks to the panellists.

Response from the Law Society of Ireland

Owen Binchy, President, Law Society

I am delighted to be here in my capacity as President of the Law Society and thank you for inviting me. The topic is of interest to a wide variety of people and in particular to legal practitioners. I am interested to see that public interest law is a way of working with law rather than a specialised area, it is aimed at improving the position of the disadvantaged and vulnerable groups in Irish society. I am particularly pleased to recognise the contribution made by FLAC, our host today, who have constantly used the law over the last 36 years to improve access to justice, particularly in their constant campaigning for a comprehensive civil legal aid system. Proper civil legal aid would help to create equal access to justice for the maginalised or the disadvantaged. FLAC has been a consistent campaigner for the rights of many marginalised people and it has contributed significantly to the development of law in the public interest.

Many solicitors have contributed to FLAC, either directly or by providing outside support. In addition, many solicitors are involved in the delivery of law in the public interest in their own practices. A lot of cases that start off in the defence for particular clients' rights or the prosecution of an individual complaint end up having wider implications for the community.

FLAC was founded in 1969. At the time I was a UCD law student and I had all the good intentions of joining; unfortunately I never did, which I have to admit. Having said that and wearing my Law Society hat, I can say that since I started practicing as a solicitor, every year we make a contribution to FLAC. It is voluntary but the forms are done in such a way that you have to subtract the contribution, or otherwise it is paid – which no-one ever does – and in that way I have made my contribution.

There is very little data in which we can track how much public interest litigation takes place. An assessment of judgments from the superior courts can only tell part of the picture. Following on the incorporation of the European Convention into Irish Law, there is procedure where any proceedings of the Higher Courts which can call in aid the European Convention can be through the court office and through a reference to the Human Rights Commission.

While issues of public interest law are not always the same as cases in which human rights are cited, the precedent is an interesting one which might merit further consideration if it was deemed important to measure levels of public interest litigation. Whatever about the number of cases, it is quite clear that such litigation is done on an individual basis. It is also clear that there are barriers if an individual litigant wants to pursue a point of law in the public interest.

I am glad to see the mention of law reform as a tool of public interest law. The Law Society has long held that in addition to advice and representation to clients, solicitors have a contribution to make to government and the Oireachtas and areas of law that need reform. In the last few years the Law Society's Law Reform Committee has examined, reported upon and made recommendations on the law of charity, the nullity of marriage, on adoption, on the law of domestic violence and we continue to monitor developments in that area. In the current year we have produced a report on discriminatory planning conditions and we are well advanced on reports on a rights based child law. In addition many other specialist Law Society committees made up primarily of practising solicitors contribute to legislative proposals in their own areas of practice. I am also glad to say that the Law Society has taken the task of providing public legal education seriously. We have taken a leading role in the dissemination of information to the legal profession and to the public on the implementation of the European Convention into domestic law or indeed our annual human rights conference has become something of a fixture on the Society's calender.

I might take this opportunity to remind you that our next conference, on Migrant Workers and Human Rights Law, will take place on Saturday 15 October in the Law Society. On 23 June last, Albie Sachs, the South African judge, addressed the inaugural lecture of the Human Rights Committee. His talk was one of the highlights of the year of my presidency.

I would like to make a brief comment on the question of legal education, which under this definition also plays its part in public interest law. While we do not categorise it as part of public interest law, our law school has a dedicated access programme for trainee solicitors. Under their scholarship programme, qualifying students have their fees paid and a maintenance grant is also payable when it is needed. We work with universities, second-level and primary schools, so the students who have been on access programmes and other educational institutions are recognised. We know that even so there will be some students that will be excluded because they have not come through previous access programmes. This year we have put another system in place to permit those to apply for support.

My son James and a co-researcher interviewed every Traveller in third level education and published a report on it. It received widespread media coverage on its launch. Even if he was not my son, I would still recommend that you all read that report.

In summary, then, my response to this conference is to welcome the opportunity to examine the use of law through the lens of public interest and to congratulate FLAC on its research and work which I expect will give a lead to a focused and effective debate on the topic. In particular it has been useful to examine how public interest law can now and in the future benefit marginalised or disadvantaged communities.

I will take back the information received here today to the Law Society for consideration and as a background to further discussion that I anticipate will be generated from the conclusions of this conference. I look forward to that debate and I assure you that the Law Society will be keenly interested in its outcome. Thank you very much.

Response from the Bar Council of Ireland

Hugh Mohan, SC, Chairman, Bar Council

I am impressed in seeing the number of barristers, both senior and junior, in attendance. When I look at the conference title, I see 'the reality and the potential'. I am quite certain that I know what the reality is – underfunding – while the potential is enormous.

There is one thing I want to leave you with: Speaking on behalf of the Bar, I confirm its commitment to legal aid and to public interest law and to everything we can do to use and advance the cause of public interest law.

One speaker raised the question of how do we get to the advocates, the people that are presenting the cases before the higher courts. How do we get to them, are they interested? In a word: yes they are.

The one message I want to leave you with is that under my chairmanship last year, very ably assisted by Turlough O'Donnell and Michael Cush, we established and launched a *Voluntary Assistance* scheme. In the past we at the Bar have tried to have a *pro bono* system in place, which is easier said than done. It is important that the system is flexible, it is important the system is used. We are sensitive not to establish a scheme which does not fall flat on its face and does not go into oblivion, so what I wanted to do is to re-emphasise that that scheme is there, we have sent forward through Jeanne McDonagh a leaflet, which, hopefully, you will see and take with you, because it sets out what the Bar is about and what you can achieve through the use of the Bar.

Put simply, the idea behind it is as follows: there are many wealthy individuals and wealthy sections of our society who come down to the courts, who utilise the best brains in the Law Library and who are prepared to pay enormous sums of money to some members of the Bar. We fully recognise and appreciate that that is only one aspect of law in this country and we at the Bar – and I speak for the entire Bar, and there has never been a dissention on this – we fully recognise and appreciate that we have an obligation to ensure that the weakest, not just the richest, have access to members of the Bar in Ireland.

In my time as chairman, I have gone on numerous occasions to some of those elements of the Bar which would be considered at the top end of the Bar who are getting those big cases. I have never once been refused when I have asked them to represent a particular member of society, for no fee, who we believe to be deserving of representation. That is what is behind the idea of this scheme. We want this scheme to work. It is not just about test cases. I heard earlier views on taking a test case and I would echo everything that was said and re-emphasise that there has to be a screening process – you move one step forward and two steps back if it is the wrong test case. We have set up a screening mechanism by which we take a look at a case and if that case stands up then there is a facility through the Bar Council to provide representation for it.

We recognise that underfunding has left many sections of society without a voice. There are many very worthwhile NGOs who are in a position to see and to highlight the right and appropriate cases and we are in a position to engage with them. With that in mind, when we set up the scheme, we called twelve organisations down to the Bar Council, and we asked them to tell us how we can assist and from that we entered into a process by which we engaged with these organisations. We had to understand how they operated before we could see what we could do for them. Through that we developed this leaflet, and you can see for example, and

it is not just test cases, and in the case of Threshold, we were able to give very practical advice to individuals to advise and assist them on how they could present arbitration schemes under the new rented dwelling legislation. In respect of some of the other organisations we can give advice on (a) the drafting of a letter, (b) on whether a claim may be brought to court, (c) what steps are needed well in advance of that to establish that, (d) documents necessary, (e) again the drafting of that. We also provide a system by which junior barristers could go out and visit a client and see how the legislation works in practice. Obviously representing a client in the ultimate stage in that process.

Providing training for advocacy was also highlighted as something that we could be very involved in and, indeed, providing advice on law reform. This year we have set up a new legislative body which will pull in different strands of the Law Library. When the Dail presents its Bills or potential Bills, we have at hand a group of our Bar to vocalise aspects of that legislation that we feel should be vocalised, not in a pro or anti-government or opposition way, but to have a law reform facility there. I think we have that educational facility there within the Library, and it is something that I want to re-emphasise as the year goes forward.

I found that there is a willingness in the Library to provide this service right across the board. The problem is that people outside the Library, the NGOs, people on the street, were not aware that the *Voluntary Assistance* scheme is in existence. We had to establish it and it is established. One of the reasons I wanted to come here today is to be able to advertise it and to tell you it is in existence. What we have to do is vocalise this, that it is there, that the Bar is very engaged with providing voluntary assistance in whatever form or fashion that you, the public, the NGOs, think will be helpful. In other words, to answer the gentleman's question – yes, we are listening, yes, we want to be part of it, yes, you have access to us. There is an open door, there is a body established, there is a leaflet with names and numbers on it and it is very much a part of a programme for change within the Bar Library. Last year we developed a twelve-point programme for reform and engagement and that was one of the points – the establishment of this scheme. Hopefully next April we will publish a report on how this scheme got up and how it is running. So it is with that in mind that I particularly wanted to speak to you today.

You may or may not know that David Byrne who was here today, Vivian Lavan, Denis McCullough and Ian Candy were all members of the Law Library who saw the need for FLAC and established it. Since that time, we have given a subvention towards FLAC, we levy our members, of course it is probably not enough but it is there and it must be recognised that it is something that we as members of the Law Library are very interested in doing and are very interested in being involved in.

To finish up, the *Voluntary Assistance* scheme is up and running – it is alive and well. I want to advertise at every opportunity that it is not just for test cases, although test cases are important, but right across the board there is willingness among all parts of the Library and, there always has been at the junior Bar, but I have certainly found, in my time as chairman, that when I have asked the upper ends of the senior Bar to represent certain people in court, I am delighted to say as head of the profession I have never once been refused. I want that message to go out. The Bar has often been seen as elitist and aloof in reality, it is its own worst enemy in the way it has gone about its business. In fact when you get into it, there has never been, I think, a better institution that has been more involved in law reform. When you hear judges making seminal decisions in particular cases and how a Supreme Court case made law or established new rights, remember that the judge did not bring the case to court, it was a barrister that, I would say, nine times out of ten without financial backing, identified that there was a gap or a lacuna in our law. And I try and emphasise time and time again, that spirit has been alive at the independent referral Bar and I want to leave you with the message, that under the *Voluntary Assistance* scheme, it is alive and well today.

Summary of key points

Prof Gerard Quinn, NUIG, Conference Rapporteur

Thank you very much. I think rapporteurs are objects of pity, they wear splendid crowns of thorns and carry the hopes and fears of countless participants, each of whom considers their contribution as unsurpassed and unsurpassable. My task today was a sheer pleasure, partly because the issues are so close to all of our hearts and also because the interventions of the participants all sparkled with passion and insight and, particularly, the insight that comes from practice and wisdom through the years. We learned a lot, we were inspired and were really moved toward the future.

In the time available I will try to do three things: first of all I will try to crystallise the big issues, as I see them, coming through the proceedings. There was an electric current present here and I will try to put my finger on that. I would like to characterise the distinctive contributions of each of the speakers, you will be glad to hear that I will not attempt to be exhaustive! Instead, I will try to abstract from the contributions the connecting threads that lead back to these big issues to see how each contributor added a new wrinkle to the overall fabric that we were uncovering today. And last and least ambitiously, I will try to draw some of the strands together – in fact, I will only make one point here due to time constraints.

First of all the big issues: why are we here, what is animating this event and where are we heading? Let me begin by recalling a true story. It concerns Mr Justice Oliver Wendell Holmes of the US Supreme Court, who was once on his way, hopping into his carriage to go to the Supreme Court to hear a case, when a member of the public shouted out, "Do Justice!". The judge turned and said "That, my good man, is not my job". At one level he was right; at one level the task of a judge is to do justice according to the law and when the values of the law do not allow him to do justice or in fact when the law itself is unjust, conscientious Judges face real dilemmas. On the other hand, and this is the reason we are here, we can also see that there is or there ought to be a very clear connection between law and justice. After all the whole point of law is to regulate behaviour justly and not just efficiently and I think this is something Robert Garcia was rather usefully pointing his finger to. Without that connectedness to justice, law simply looses legitimacy as well as effectiveness.

One of my personal heroes, Roscoe Pound, was very fond of saying that all law inevitably tends toward decay. It will inevitably decay through time, what matters is how it is refreshed or whether it is refreshed and whether it is reformed in a meaningful manner. How is that to be done? Primarily of course it is done through the political process and that is how it should be. No-one here, I think, seeks to supplant the primacy of the political market place, rather I think we are here because that marketplace only tends to respond to, to listen to, those with voice, with power and resources. The marketplace has gaps in other words. There are certain issues that do not get a full hearing because there is no natural constituency to back them up and there are certain groups whose just claims never get full ventilation because despite their numbers they are simply not listened to with respect in the political process. If no-one speaks for the public interest with respect to these groups, then essentially nothing happens and, as lawyers, we are very used to focusing on the synchronic, the here-and-now. And I think it is also useful and, as Robert Garcia reminded us, don't forget the accumulation of exclusion down through the generations.

What is the public interest and how is it to be defined and by whom? Is it the sum of competing sectors and competing interests or is it something that can transcend these competing interests? Who speaks for the unseen interests and how do we know that they are genuinely

representative of these unseen interests and groups? These issues aside – and these are very important issues – one thing is clear, if there is no process for addressing these interests they will simply be ignored – how then can these gaps in the political marketplace be fulfilled and what is the role of public interest law and public interest litigation in doing this? This was really the electric current that ran through all of the contributions.

I think **Noeline Blackwell** at the outset framed it very well by asking us to reflect on the past of public interest law and litigation in Ireland and its potential for the future. We really are at a very important crossroads in this jurisdiction. she commented very rightly, and it is fantastic to see the numbers of people here and the spread of interest present in this hall; that does really augur well for the future. The aim of FLAC coincides very nicely with this project, if one could call it that, which is to ensure equal access to justice for all and to enable people to speak for themselves and vindicate their own rights. She especially drew our attention to the community dimension to public interest law and observed rightly that it works best when the community is actively engaged from the outset. She explained that Mel Cousins' paper is still a work in progress and will be finalised taking into account the views of this conference and other inputs and I think that is altogether the right way of going about it. She also acknowledged and mentioned the presence in the room of David Byrne SC, who is genuinely one of the heroes of free legal aid in Ireland. Another one happens to be Vivian Lavan, whom I had the great privilege of working under in the Law Reform Commission years ago.

Our highly distinguished chair, **the Honourable Mrs Justice Catherine McGuinness**, echoed the views expressed by Noeline and very usefully referred to the diversity of actors in the public interest law sector many of whom do not think of themselves as actors positively engaged in this endeavour, but in fact they are. She referred to the seminal work done by the Law Reform Commission on class actions and she might equally have referred to the innovative heading in the programme for law reform of our Law Reform Commission, focused very specifically on vulnerable groups in Irish society. And their work on the elderly and reform of incapacity is actually quite peerless. I think the only law reform commission that comes close to them is the South African Law Reform Commission in that regard.

Mel Cousins is the centrepiece of this event. People were mentioning the conference in 1968 or the 'summer of love' in which FLAC was founded; we will all be remembering Mel if we ever reach our dotage in years to come as the indispensable man who provided the work and the insight and the map, if not blueprint. His report provides the occasion for this event; it is not the last word, but it is the first indispensable step along taking choices at this crossroads.

He said his first challenge was to define what public interest law was; that is quite a challenge. He defined it, and I hope I have got this right, as a way of working with the law to achieve justice for disadvantaged and vulnerable groups. I think that alone is a significant contribution to the debate. Once we can form a consensus around that, we are off to an exceptionally good start.

He focused on four related areas of endeavour to achieve a Public Interest Law culture as well as process. He looked at legal education, which brings to mind a quote from a French aristocrat travelling in Common Law England several hundred years ago, who said, if I remember it correctly, "Lawyers are like weeds that grow in gardens cultivated by the hands of others and once they take root, they extinguish all other living vegetation". So there is the image of the lawyer down through history as a parasite, but there is another side. We are officers of the court, we cannot but be responsible for the failing of the system. There is as it were, in philosophical terms, a unit of moral agency called the legal profession and it behoves us to take responsibility for the failures of that system and also for some of its occasional successes.

So he looked at legal education and suggested improvements can be made along a series of fronts. For example, there ought to be greater representation of disadvantaged groups in our law schools, and I am glad to say there is a lot happening on that front but more can and

should take place. He called for clinical legal education as a way of opening the hearts and minds of young novice lawyers to the often unseen social impact of the law. It is not their fault that they do not see this, it is that they are not given the structured opportunity to see it and our challenge in law schools is to put that in place. He called for a bridging of the gap between law schools, as such, as collective entities, not just as individuals in the law schools, and the communities they serve or at least that they inhabit and never thought they served but in fact could serve. He called for, what I call an 'ideas factory', that is to say, a centre for Public Interest Law to provide research and support, but essentially to churn out ideas, creative and innovative ideas about argumentative strategies that focus on the courts but also focus on other agencies of change in our society. Indeed he also called for legal education outreach to the community on the part of our law schools.

He then looked at the law reform process in which there are a wide variety of public bodies playing an active part including the Oireachtas, Oireachtas Committees, Law Reform Commission, the Human Rights Commission, the Equality Authority and of course the Bar Council and the Irish Law Society. Capacities do need to be raised so as to upskill people to engage with these bodies, which are, in fact, receptive to the proper kinds of inputs. It is not always enough to say "here is a problem", it is sometimes better to say "here is a workable solution and here is our contribution to the ongoing process of reflecting on how we should change our law in this country".

He then looked at Public Interest Litigation, which is, of course, what we as lawyers focus on primarily, but it is not necessarily the be-all and end-all of everything. He instanced very interesting examples from the UK and identified major barriers, including costs as well as more technical and more procedural ones. He proposed a Public Interest Litigation Fund to help defray these costs. He suggested a review and a reform of procedural barriers, which is altogether possible given what is happening in our neighbour across the water, in the UK. He recommended the introduction of class actions which of course neatly coincides with the recommendations of our Law Reform commission and sought a clarification or a relaxation of *amicus curiae* rules in our courts.

He concluded by saying that Public Interest Law was at an early stage in Ireland, mind you there have been many Barristers and Solicitors that have played a very prominent part in Public Interest Litigation; Donal Barrington comes to mind in the *Magee* case in 1974. Mel said it is at an early stage, it does have huge potential and even he was surprised by the degree of consensus there is out there as to this. He commended FLAC for commissioning the report and all I can say to that is, actually we should commend you for doing the work and I think you are the real hero of the day.

Maurice Manning observed that little is known at present about Public Interest Law by the man on the street and a lot more needs to be done in raising awareness. He said Mel's paper provided many challenges: 1) to the Law Schools in terms of leadership, to show leadership. There are two heads of law schools here today and I am glad to say I shared that splendid crown of thorns until August myself. 2) The other challenge was to the legal profession and, in particular, the larger firms to get more actively engaged. He noted the eagerness and willingness of Oireachtas members to receive inputs from civil society and to turn those inputs around and put them to good work. And indeed his body, the Human Rights Commission, is, as he put it himself, now fully operational and engaged in many of the issues.

Julian Burnside then spoke, and as he said himself, he came to Public Interest Law as a commercial lawyer and if I may say so, this shows there is no 'good-guy/bad-guy' distinction in law. Everybody can play a part, it does not matter if your practice is primarily commercial or international or public interest, everybody has a role to play. He noted two problems with the law; either the law is satisfactory but people have no access to it, or the law itself is the problem. Both problems attend disadvantaged and vulnerable groups, redressing them

requires properly funded legal aid, as well as a Bar motivated to engage in *pro bono* work. His account of various test cases involving detainees in Australia in the context of asylum were harrowing in the extreme; they brought to my mind the show trials in Stalin's Russia in which the family was usually charged with the cost of the bullet that executed their loved ones. He spoke of the raw human edges to these issues and the human element really shone through. I think it was again Oliver Wendell Holmes who said that achieving greatness in the law does not mean earning a lot of money or working with a large corporation, but seeing the human side of our business and through it catching an echo of the infinite. I think by saving some lives in Australia and by highlighting obvious injustice through caselaw to the point that they could not be ignored by the government, means that you, Mr Burnside, live greatly in the law and we all respect and admire greatly you for that.

There were two fascinating questions to Mr Burnside, about the status of international treaties in Australia as well as the funding levels for public interest law. In response, Mr Burnside referred to the predominance of black-letter lawyers on the Australian High Court. May I assure you that this is a global phenomenon! He revealingly told of very innovative tax measures that could be used to incentivise greater involvement by large law firms, something we can learn a lot from here.

Roger Smith from the UK, from JUSTICE, related to us with great enthusiasm and excitement, not generally something you associate lawyers with, spoke about the explosive growth of test case strategies in the UK which first started in administrative law and more lately under the Human Rights Act. He reminded us that even the left had a problem with rights. Indeed I remember Roy Hattersley coming out explicitly against a Bill of Rights in the UK in the 1980s.

He cited four barriers at the moment, one of which is costs, but he said it is not insurmountable, with a creative will it can be gotten around. Procedural barriers too can be gotten around and I think you have done great work in the UK on this. He also mentioned issues concerning the constitutional status of rights in the UK and the innovation of the doctrine of proportionality in UK law. He said the caselaw is inspiring a new debate about the proper role of the judiciary in a democracy, a debate that has been going on here for years and I think one that has no natural end point.

He said the test case field was fertile territory for lawyers; in a way, his presentation brought us back to really a very noble period in the English Common Law in the 1600s, when the Common Law Courts fiercely and courageously resisted the executive under Chief Justice Bonham. As he said to us, "ah, to be young again", to which I can only say, I concur.

Ellie Venhola navigated us through the richness of Canadian Law and Practice in the field of Public Interest Law. She recounted the birth of the Charter of Fundamental Rights which co-exists with the web of provincial human rights codes. She painted a very complex picture of change and change enablers, including the Law Reform Commission bodies and other bodies in Canada. She alluded to many challenges including a rights-free administrative zone, I think that is what the Ombudsman was trying to get at in this jurisdiction: Crabbed or positivistic judicial interpretation, again a global phenomenon, as well as access to justice. She referred to fascinating caselaw concerning autistic children; we have had some experience of that here and I think, moving ahead to when Gerry Whyte talked about Comparative Law, we really can learn a lot from each other. And the funny thing is that we know too little about Canadian Law in this jurisdiction. We really need to do more.

Robert Garcia reintroduced the human element with vigour into the debate. Last year was the fiftieth anniversary of *Brown v Board of Education* and one of the few people to comment on this publicly and remind people of it was Michael Farrell in the *Irish Times* and we thank him for that. You may recall that in *Brown* they did not so much expressly overrule *Plessy v Ferguson* dating back to the 1890s. Essentially what the Supreme Court said was that new sociological

evidence had come to light, to which the court could not have had access in 1879, to show that children of colour would suffer irremediable damage if kept segregated, a very interesting approach because of the use of sociological data to actually prove the case. The real problem with *Brown* was *Brown II* in which the Supreme Court said, by the way, you do not have to really implement this, so long as you implement it with all deliberate speed, that's all right. The court gave with one hand but took back with the other. By the way, Felix Frankfurter is credited (or discredited) with coming up with that phrase.

He very graphically illustrated aspects of long-term effects of marginalisation with respect to Hurricane Katrina. And he turned to his home town – and we all have a home town to which we owe a civic responsibility – Los Angeles, which is similarly affected by segregation. He said that segregation still existed there and that his task was to help people to help themselves in visualising the community they wanted to live in, to build coalitions, to engage in strategies with the media, to do multidisciplinary research to prove the case through statistical data you can present to the court, as in *Brown v Board of Education,* and to be part of the solution. Not necessarily always to attack, but sometimes even to enter the policy process to shape the contours of the solution. Usefully, he asked us to reframe the issue slightly away from test cases. He asked us to view test cases as a means to an end. The end really is justice in our society, which begs the question, what is justice and who helps to frame it? He gives back to his community, which, in my view there is nothing more noble that a lawyer can do.

Fiona Doherty, then, charted the sad story of abuses in Iraq and Afghanistan and how two very ancient statutes are being invoked by public interest law firms, the Alien Tort statute but also Section 1983 of the Civil Rights Act 1867. This is not new stuff, it is not rocket science to hold senior officials to account. She did mention some good news from the US Supreme Court in *Hamdi v Rumsfeld* and *Rasul v Bush*, but of course we will wait and see how the next Supreme Court looks like and how it approaches the issues. Interestingly enough too, in the case they have worked with two former leading military officials which, again, leads me to suggest there is no 'good-guy/bad-guy' distinction, you will find allies everywhere when you try to push the right kinds of buttons. So we await with interest the outcome of that case as well as in further cases.

Professor Monica McWilliams, the incoming Chief Commissioner of the Northern Ireland Human Rights Commission, updated us on the work of the Human Rights Commission in the North as well as the Bill of Rights process. She said something very revealing: she said that the Bill of Rights, when eventually adopted, will be measured by how it protects disadvantaged and vulnerable groups in Northern Irish society. That is an incredibly important point. We will of course hold her to it when we see the Bill of Rights in a few years time. And she also touched on an issue – and I think there are shades of this in Robert Garcia's presentation as well as some others – which is substantive social justice; it is not simply enough to protect people against discrimination, to make sure the doors are open to them, but it is also necessary to help them go through those doors. So the status of social and economic rights and their linked civil and political rights is one of the defining issues of the moment, not just in Ireland but around the world.

Geoff Budlender – well now, he entertained his audience by relating to us the Auberon Waugh story that I will not repeat. One of the fascinating things he mentioned was that it was possible to do justice even within the apartheid regime. In totalitarian regimes it is quite amazing there is always a struggle to put the veneer of legality on what the regime does. What he basically said was working within the four corners of that it is still possible to squeeze justice on occasion. He said some of the lessons they learned from that period were not all dissimilar to the lessons they are learning with respect to the current regime which has utterly changed and is more democratically oriented. He mentioned a fascinating case dated 2000 on HIV and AIDS, in which the Constitutional Court had said that the government had not taken reasonable measures considering available resources to provide medication to HIV patients, which is a fascinating decision and one worth studying.

He talked about the need to get facts right in presenting test cases, he talked about the need to develop links to community organisations and the fact that legal activism does not necessarily only take place in courts. He said a lot of the signs were favourable in South Africa in that the law is now in place, but a large number of people are still experiencing extreme poverty and social exclusion.

Our own **Emily O'Reilly**, the Ombudsperson, spoke about the history of the setting up of that office and about certain statutory exclusions which effectively in this country create a rights-free zone and I think we need to become allies in helping her overcome that. She talked about the importance of her role in addressing some issues and specifically in the area of nursing homes. The office has been very successful indeed.

Michael Farrell actually summed up a lot of the proceedings, but since it's now my job to sum up, I am going to sum up his summing up! He is of course a very distinguished solicitor in private practice, long-standing NGO activist, solicitor now with FLAC and a member of the Human Rights Commission. He said some very interesting things that are worth noting, for example he asked the question at the outset: now that Ireland is a wealthy society, do we need Public Interest Law and Litigation? I think we all know the answer, it is now needed more than ever because of the widening gaps between the haves and the have-nots and the tendency of the haves to purchase the absence of the other, to segregate them through this new-found wealth and therefore that has to be guarded against. He mentioned a number of actors and the importance of collaborating actively with all of these actors to produce the right kind of results and referred to a variety of models available. The resource issue could be overcome there are resources and large law firms could do more; and the multiplicity of players could be better energised to work in the same direction.

Gerry Whyte, our colleague from Trinity College, spoke directly of the role of university law schools. He said Public Interest Law is a new subject, it is highly underdeveloped and few students, so far at least, study it. There are few practising lawyers in the area and very few academic lawyers – I think he counted twelve, for a long, long time he was the lone ranger in the field and I think he deserves enormous credit for pioneering Public Interest Law in Trinity College. He was the beacon that inspired all the rest of us in the other law schools. He spoke about law schools providing courses in Public Interest Law for undergraduates and for providing more formalised contacts between other academics, the professions and NGOs, and to make legal education much more accessible. He welcomed the recommendation for the establishment of a Centre for Public Interest Law and spoke warmly about the 1968 conference in which David Byrne, Vivian Lavan and others basically set up FLAC.

And then lastly we had **Hugh Mohan** from the Bar Council with a very interesting presentation, basically reiterating the commitment of the Bar Council to Public Interest Law, outlining for us the new *Voluntary Assistance* scheme which is in its infancy and we wish it very well. He also talked warmly about the active involvement of barristers at all levels in Public Interest Law and many of them are here today who are again unseen heroes in this process. **Owen Binchy** from the Law Society also echoed these words and mentioned what the Law Society itself has been doing throughout the years. If I may single out the work of its Law Reform Committee, that is producing absolutely first-rate material for the benefit of the Oireachtas and also for the benefit for overall law reform in our society.

There was one issue from the Q & A which is that we have to acknowledge the importance of the issue raised by Davy Joyce of the Irish Traveller Movement Legal Unit, about working out the relationship between central support structures, academic and activist, and community law centres dealing with large amounts of work, not always on a specialist basis.

I will leave you with one last point, and it is this, we are plotting a road to the future. We are at the crossroads, but to my way of thinking, we are actually returning to the past, particularly if we go back to the foundation of this Republic, this *res publica*, which was founded precisely in order to cherish all of the children of the nation equally. That was the forgotten promise and I think that is the promise that we are renewing today here publicly by debating Public Interest Law and Litigation.

Thank you very much.

Profiles of contributors

The Honourable Mrs Justice Catherine McGuinness, President of the Law Reform Commission

Mrs Justice Catherine McGuinness, a Judge of the Supreme Court, was born in Belfast and educated in Belfast and Dublin (Alexandra College, TCD and the King's Inns). Mrs Justice McGuinness was called to the Irish Bar in 1977. In 1989 she was called to the Inner Bar, and was called to the Bar of New South Wales in 1993. In addition to her judicial career, Ms. Justice McGuinness has served on An Bord Uchtála (the Adoption Board), the Voluntary Health Insurance Board, the National Economic and Social Council and the Second Commission on the Status of Women, and has chaired the National Social Services Board, the Board of National College of Art and Design, the Employment Equality Agency, the Kilkenny Incest Investigation and the Forum for Peace and Reconciliation.

Noeline Blackwell, Director General, FLAC

Noeline Blackwell joined FLAC as Director General in 2005. Before that, she worked in general practice as a solicitor, with a particular interest in family law and human rights law in general and in refugee law in particular. She is chairperson of the Law Society's Human Rights Committee and also sits on its Family Law and Civil Legal Aid Committees. She has contributed the chapter on refugee law to *The Law Society of Ireland: Human Rights Law* (Oxford University Press 2004) and she lectures on the topic. She is a former chairperson of the Irish section of Amnesty International and is a trustee of Front Line, the Dublin-based international foundation for human rights defenders at risk. She is a member of the legal Working Group of the Immigrant Council of Ireland.

Mel Cousins BL

Mel Cousins has extensive experience of both legal and social policy research. He qualified as a barrister-at-law and has written extensively on legal issues including, most recently, a book on *Social Welfare Law* (Thomson Round Hall, 2002). He has been involved in a number of research projects on public interest law and, in particular, on legal aid, including a research project on access to justice in four European countries (funded by the Council of Europe) and a comparative study of the development of legal aid (which led to a publication entitled *The Transformation of Legal Aid: Comparative and Historical Studies,* edited by Francis Regan, Alan Paterson, Tamara Goriely and Don Fleming, Oxford University Press, 1999). (His contribution to that book has recently been republished by the Public Interest Law Initiative in a collection of works on access to justice.)

Mel has accrued many years of experience in both qualitative and quantitative research, including research on the need for an Ombudsman for Children (on behalf of the Children's Rights Alliance) and on Childcare in Ireland (on behalf of the Joint Oireachtas Committee on Women's Rights). He has detailed experience of the Irish policymaking process, having worked as adviser to the Irish Minister for Social Affairs (1997-2003).

Dr Maurice Manning, President, Irish Human Rights Commission

An academic by background, Dr Manning previously lectured in politics in University College Dublin and has been visiting professor at the University of Paris (Vincennes) and the University of West Florida. He is a member of the Senate of the National University of Ireland, of the Governing Authority of University College Dublin and was a member of the Governing Authority of the European University Institute at Florence.

Dr Manning has written several books on modern Irish politics. He was a member of the Oireachtas for twenty-one years, serving in both the Dáil and the Seanad. He was a member of the New Ireland Forum and the British Inter-Parliamentary Body. He served as both Leader of the Seanad and Leader of the Opposition in that House.

Julian Burnside QC, Victoria, Australia

Julian Burnside QC is a barrister based in Melbourne, Australia. He acted for the Ok Tedi natives against BHP in relation to the destruction of the Ok Tedi river in Papua New Guinea, for Alan Bond in fraud trials, for Rose Porteous in numerous actions against Gina Rinehart, and for the Maritime Union of Australia in the 1998 waterfront dispute against Patrick Stevedores. He was the Senior Counsel assisting the Australian Broadcasting Authority in the "Cash for Comment" inquiry and for Liberty Victoria in the Tampa litigation.

He was one of the founders of the Justice Project in Australia in 2004, which aims to reform Australia's refugee policy. The organisation, which is non-party political, is also campaigning for a Charter of Rights in Australia. He has worked to challenge the Mandatory Detention policy and the use of offshore detention pursuant to the "Pacific Solution". He has represented many asylum seekers held under inhumane conditions in detention centres.

He established Spare Lawyers for Refugees, a group of lawyers who act *pro bono* for unrepresented asylum seekers. He and his colleagues use the legal process in an attempt to challenge the harsh laws and oppressive conditions that form a backdrop to high levels of suicide and depression among detainees. They have mounted a number of test cases to bring the policy responsible for these conditions under legal scrutiny.

He was the architect of *From Nothing to Zero*, a collection of letters from refugees in detention centres, published by Lonely Planet in 2003. He is the author of *Wordwatching - Fieldnotes from an Amateur Philologist* (Scribe, 2004).

Roger Smith, Director, JUSTICE, UK

Roger Smith has been Director of JUSTICE since November 2001. He also currently attends in his capacity as Honorary Professor of Law at the University of Kent, Canterbury. He was Director of Education and Training at the Law Society of England and Wales from 1998 to 2001. From 1980 to 1986, he was solicitor to the Child Poverty Action Group. Between qualifying as a solicitor in 1973 and 1980, he worked at Camden Community Law Centre and was Director of West Hampstead Community Law Centre.

Roger has written widely on matters relating to legal services, including editing or writing the following publications for the Legal Action Group which related to the comparative study of developments in different jurisdictions. He was the author of *Children and the Courts* (Sweet and Maxwell, 1980), *Shaping the Future: New*

Directions in Legal Service (LAG, 1995), *Justice: Redressing the Balance* (LAG, 1997) and *Legal Aid Contracting: Lessons from North America*. He was awarded Legal Journalist of the Year in 1997. He is a member of the Legal Services Commission public interest advisory panel and the FCO expert panel on rule of law.

Ellie Venhola, Community Legal Clinic, Ontario, Canada

Ellie Venhola is a legal aid lawyer practicing and writing in the areas of poverty law and human rights. For the past two years she has focused her work on test litigation cases before courts and tribunals, representing families of children and adults living with medical exceptionalities. Ms. Venhola also dedicates her professional skills to creative law reform and challenges to systematic discrimination.

A graduate of Osgoode Hall Law School, Toronto, Ontario, she articled with the Ministry of the Attorney General – Crown Law Office (criminal). She currently works with three other skilled lawyers, five experienced caseworkers, three support staff and a host of volunteers at Community Legal Clinic (Simcoe, Haliburton, Kawartha Lakes), the largest general practice poverty law clinic in Ontario.

Robert Garcia, Executive Director, Center for Law in the Public Interest, Los Angeles, US

Robert García is an attorney with extensive experience in public policy and legal advocacy, mediation and litigation involving complex social justice, human health, environmental and criminal justice matters. He has influenced the investment of over $18 billion in underserved communities, working at the intersection of social justice, sustainable regional planning, and smart growth. He graduated from Stanford University and Stanford Law School, where he served on the Board of Editors of the Stanford Law Review.

He is a nationally recognised leader in the urban park movement, bringing the joys of playing in the park to children in park-starved communities. He helped build and lead diverse alliances to create the state parks in the Chinatown Cornfield in the heart of downtown Los Angeles in Taylor Yard as part of the greening of the Los Angeles River, and in the Baldwin Hills in the heart of African-American Los Angeles. He leads the campaign to diversify access to and support for national forests. He served on the Executive Committee of the Yes on Prop 40 Campaign to help pass California's $2.6 billion park, water and air bond in 2002, the largest in United States history, with unprecedented support among communities of colour and low income communities.

Robert served as Chairman of the Citizens' School Bond Oversight Committee overseeing the investment of $14 billion to build green public schools as centres of their communities in Los Angeles from 2000 to 2005. Cardinal Roger Mahony appointed him to the Justice and Peace Commission of the Archdiocese of Los Angeles. He is a Senior Fellow at the UCLA School of Public Policy and Social Research.

Fiona Doherty Senior Counsel, U.S. Law and Security Program

Fiona joined Human Rights First in 2001. As a senior associate in the US Law and Security Program, Fiona works to ensure that US policies relating to counter-terrorism and national security incorporate human rights protections. In February of 2004, Fiona accepted a position at the Dontzin Law Firm, but she continues to share her time and her expertise with Human Rights First in a part-time capacity.

Prior to joining Human Rights First, Fiona received a Bernstein fellowship from Yale Law School to work for a year at the Committee on the Administration of Justice (CAJ), a human rights organisation in Belfast, Northern Ireland. Before that, she was a law clerk for the Honourable Martha Craig Daughtrey on the US Court of Appeals for the Sixth Circuit. Fiona graduated with highest honours from the University of Virginia (1996) and from Yale Law School (1999).

Geoff Budlender, Advocate of the High Court, South Africa

Geoff Budlender is an Advocate of the High Court of South Africa. In 1979 he was one of the founders of the Legal Resources Centre, which is South Africa's leading public interest litigation centre. After serving as National Director, in 1996 he was appointed Director-General of the Department of Land Affairs in the Mandela government.

Geoff held that post until early 2000, when he returned to the Legal Resources Centre to head its Constitutional Litigation Unit. In that capacity, he appeared in the Constitutional Court in a number of cases, including the *Grootboom* case (right to housing) and the *Treatment Action Campaign* case (HIV/AIDS). He is now in private practice at the bar, specialising in human rights work. He has acted as a Judge of the High Courts in Johannesburg and Cape Town.

Prof Monica McWilliams, Chief Commissioner, Northern Ireland Human Rights Commission

Monica McWilliams is Chief Commissioner at the Northern Ireland Human Rights Commission and professor of Women's Studies and Social Policy at the University of Ulster. She is a co-founder of the Northern Ireland Women's Coalition, a political party which was formed with the object of increasing the representation of women in the peace talks. Professor McWilliams was elected to the new Northern Ireland Assembly and was nominated as Chairperson of the Human Rights Implementation Committee of the Good Friday Agreement. She is a member of the Domestic Violence Committee of the Family Courts Children's Order Advisory Committee.

Professor McWilliams is a Research Associate with the Institute for Transitional Justice at the University of Ulster. She holds a Doctor of Humane Letters from Lesley College, Massachusetts, 1998 and is a graduate of Queens University Belfast and of the University of Michigan. She has published widely on the effect of political conflict on women's lives and has a special interest in domestic violence.

Ms Emily O'Reilly, Ombudsman and Information Commissioner

Emily O'Reilly was appointed Ireland's third Ombudsman in June 2003. Prior to her appointment, Ms O'Reilly was a journalist and author and had acted as political correspondent in conjunction with various media since 1989.

The Ombudsman was also appointed Ireland's second Information Commissioner under the Freedom of Information Act 1997 on 1 June 2003. In this capacity Ms O'Reilly provides an independent review of decisions relating to the right of access of members of the public to records held by public bodies. She is also a member of the Standards in Public Office Commission, which was set up under the Ethics in Public Office Act 1995 and of the Dáil Constituency Commission.

Michael Farrell, Senior Solicitor, FLAC

Michael Farrell was prominently involved in the Civil Rights movement in Northern Ireland in the 1960s and 1970s and has campaigned on many civil rights and human rights issues over the last 30 years. He was involved in campaigns for the Birmingham Six and other victims of miscarriages of justice in the 1980s and in the campaign against political censorship under Section 31 of the Broadcasting Act. He was vice-chair and then co-chair of the Irish Council for Civil Liberties for most of the 1990s and was involved in campaigns for gay rights, divorce, equality laws, refugee rights, against racism and for the incorporation of the European Convention on Human Rights into Irish law.

Michael has an M.Sc. in Politics and was formerly a journalist and author. He is now a solicitor and has been involved in taking cases to the European Court of Human Rights and other international bodies. Born and brought up in Co. Derry, he lived for 20 years in Belfast before moving to Dublin where he now lives and works as Senior Solicitor at FLAC. Michael is a member of the Irish Human Rights Commission.

Professor Gerry Whyte, TCD, Dublin

Gerry Whyte is an Associate Professor in Trinity Law School and a fellow of Trinity College Dublin. The author and co-author of books on public interest law, constitutional law and trade union law, he has also edited books on aspects of law and religion and Irish Social Welfare Law and has published extensively in the areas of public interest law, constitutional law, social welfare law and labour law.

His book *Social Inclusion and Public Interest Law in Ireland* was published by the Institute of Public Administration in 2002. He is also active in a number of social justice and legal aid organisations and is a member of the Commission on Assisted Human Reproduction and a former member of the steering group of the Irish Council of People with Disabilities. His research interests are public interest law, constitutional law, labour law, social welfare law and law and religion.

Owen Binchy, President, Law Society of Ireland

Owen Binchy was admitted to the roll of solicitors in 1971 and is Managing Partner of the law firm James Binchy & Son, based in Charleville, Co. Cork. He was Southern Law Association (SLA) nominee to the Law Society Council in 1987.

He was first elected to the Law Society Council in 1989. Owen was elected Junior Vice-President of the Law Society in 1999, Senior Vice-President in 2003 and President of the Law Society of Ireland in 2004/05. He has chaired Law Society committees such as the Conveyancing, Registrar's, Education and Finance Committees.

Hugh Mohan SC, Chairman, Bar Council of Ireland

Hugh Mohan SC is Chairman of the Bar Council of Ireland. He was called to the Bar in 1985 and became a Senior Counsel in 2000. His practice consists mainly of defamation, civil and commercial work and he has advised a number of media outlets in libel.

He served as Chairman of the External Relations Committee to the Bar Council. He was chairman of the Advisory Group on defamation which reported to the Government.

Donncha O'Connell BL, NUI Galway

Donncha O'Connell was called to the Irish Bar in 1992 and joined the UCG Law Faculty as a Lecturer in Law in 1993 after completing an LL.M at the University of Edinburgh. He teaches Constitutional Law, European Human Rights and Legal Systems on various programmes offered by the Faculty. From 1999 until 2002 (while on leave of absence) he was the first full-time Director of the Irish Council for Civil Liberties.

In 2002 he was appointed as the Irish member of the EU Network of Independent Experts on Fundamental Rights established by the European Commission. Donncha has participated, as a Council of Europe expert, in several judicial training programmes in Croatia, Georgia and Azerbaijan and has worked in a similar capacity in other countries with the Netherlands Helsinki Federation and Interights. Donncha is Dean of the Faculty of Law at NUI Galway.

Professor Gerard Quinn, NUI Galway

Gerard Quinn is the Vice President of the European Committee of Social Rights (Council of Europe, Strasbourg) and a co-director of the EU Network of Independent Legal Experts on Non-Discrimination Law.

He is a member of the Irish Human Rights Commission and leads a delegation from Rehabilitation International (RI) to the United Nations body charged with drafting a new human rights treaty on disability. Gerard is a professor of law at the NUI Galway Faculty of Law.

List of conference participants

Abrahamson, William	Barrister-at-Law
Alexander, Pam	Royal British Legion
Al Nazer, Zena	UCC FLAC
Ardagh, Sean, TD	Oireachtas Justice Committee
Armstrong, Fergus	McCann Fitzgerald Solicitors
Armstrong, Phil	Legal Aid Board
Azema, Marianne	Office of the Ombudsman for Children
Bannon, Margaret	Office of the Attorney General
Barrett, Damon	Irish Centre for Human Rights NUIG Student
Barrett, Mary	Drumgoole Solicitors
Barrett, Nicola	NUIG Student
Barry, Eilis	Equality Authority
Bennett, Pat	Family Support Agency
Berkeley, Karen	Irish Refugee Council
Binchy, Owen	President of the Law Society of Ireland
Black, Fergus	Irish Independent
Blackwell, Noeline	Director General, FLAC
Blake, Teresa	Barrister-at-Law
Boyd, Roisín	Journalist
Brady, Alan	Law Reform Commission
Brady, Gerard	
Brazil, Patricia	Barrister-at-Law
Brennan, Tony	Northside Community Law Centre
Brophy, Kevin	Brophy Solicitors
Browne, Dervla	Senior Counsel
Bruton, Claire	Law Reform Commission
Buckley, Alan	Barrister-at-Law
Buckley, Daragh	
Buckley, Lydia	UCC FLAC
Buckley, Susan	TCD Student
Budlender, Geoff	Advocate of the High Court, South Africa
Burke, Christina	NUIG
Burnside, Julian	Queens Counsel, Melbourne, Australia
Butler, Caroline	Solicitor
Butler, Una	Barrister-at-Law
Byrne, David	Senior Counsel
Byrne, Irene	Dublin Rape Crisis Centre
Callan, Eugene	Cara Cheshire House
Callanan, Frank	Senior Counsel
Campbell, Robert	Alternatives to Violence Organisation
Carroll, Eamonn	Noonan Linehan Carroll Coffey Solicitors
Carroll, Jennifer	Trainee Solicitor
Casey, Deirdre	North King Street CIC
Casey, Mary	Barnardos
Clancy, Paula	TASC
Clare, Denise	Centre for Public Enquiry
Clissmann, Alma	Law Society
Clissmann, Inge	Senior Counsel
Clohessy, Aisling	NUIG Student
Coen, Martin	Solicitor

Collard, Aideen	Barrister-at-Law
Colleran, John	NUIG Student
Colley, Anne	Legal Aid Board
Collins, Eoin	NUIG Student
Comerford, Phyllis	
Conlon, Carthage	Michael E Hanahoe Solicitors
Conlon, Dr Patricia	Law Faculty, UL
Cooke, Frances	Revenue Solicitor
Corbett, Rioghnach	Revenue Solicitors' Office
Cosgrave, Catherine	Immigrant Council of Ireland
Costello, Joe, TD	Oireachtas Justice Committee
Costello, John	Eugene F. Collins Solicitors
Costello, Sinead	
Coughlan, Terence	Barrister-at-Law
Coulter, Carol	Irish Times
Cousins, Mel	Report Author
Crean, William	
Crehan, Fergal	Barrister-at-Law
Crewe, Don	FLAC Council
Cristea, Adrian	Vincentian Refugee Centre
Cronin, Patricia	
Crowley, Fiona	Research & Legal Officer, Amnesty International
Cuffe, Ciaran, TD	Green Party Spokesperson on Justice
Cullotty, Michael	MABS - NDL
Cummiskey, Siobhan	Griffith College
Curneen, Caroline	TCD Student
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Daly, Colin	Northside Community Law Centre
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de Courcey, Elaine	FLAC
de Paor, Moya	Northside Community Law Centre
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Dennehy, Clare	FLAC
Devoy, Michael	Barrister-at-Law
Dignam, Conor	Barrister-at-Law
Dineen, Betty	Legal Aid Board, Law Centre, Cork
Doherty, Anna	TCD Student
Doherty, Fiona	Human Rights First, USA
Doherty, Noel A	Courts Service
Dolan, Muriel	Office of the Financial Regulator
Donnelly, Lawrence	Law Faculty, NUIG
Dowling, Karen	TCD Student
Downes, Mairead	
Doyle, Mark	Actons Solicitors
Doyle, Nuala	AIM Family Services
Duffy, Maria	NUIG Student
Duffy, Marie Brigid	Legal Aid Board Navan Law Centre
Duggan, Grainne	McCann FitzGerald Solicitors
Dunne, Claire	National Women's Council of Ireland
Dunphy, Jonathan	Jonathan Dunphy & Co., Solicitors
Durack, Martin	NUI Galway
Egan, Nuala	Barrister-at-Law
Ellis, Dave	Community Legal Resource

Evans, James	James P. Evan Solicitors
Evers, Patrick	Cara Cheshire House
Ezeani, Matthew	Ceemex & Co., Solicitors
Fahy, Elaine	Barrister-at-Law
Farrell, Bridget	DIT Student
Farrell, Michael	Senior Solicitor, FLAC
Farrell, Orla	
Finn, Gerry	Irish Human Rights Commission
Fitzgibbon, John	
Fitzmaurice, Karl	Revenue Solicitors
Fitzmaurice, Peter	Irish Centre for Human Rights
Flaherty, Philip	NUIG Student
Fleming, Aileen	Daniel Spring & Co., Solicitors
Flynn, Jennifer	SICCDA
Forde, Brenda	Treoir
Forde, Catherine	Barrister-at-Law, IFPA
Freeman, Sarah	Barrister-at-Law
Gannon, Bernadette	NUIG Student
Garcia, Robert	Center for Law in the Public Interest, USA
Gardiner, Frances	Barrister-at-Law
Gately, Una	
Gibbons, Norah	Barnardos
Hackett, Edel	NUIG Student
Hackett, Kate	NUIG Student
Hallahan, Veronica	TCD Student
Hamilton, Matthew	The One Foundation
Hanahoe, Terence	Michael E Hanahoe Solicitors
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Harnett, Kathryn	FLAC
Hartigan, Noeleen	Simon Community of Ireland
Harvey, Prof Colin	Northern Ireland Human Rights Commission
Haughton, Helen	Irish Penal Reform Trust
Haverty, Martin	NUIG Student
Healy, Jacqueline	Migrant Rights Centre Ireland
Heffernan, Jacqueline	FLAC
Hegarty, Eileen	NUIG Student
Hehir, Andrew	Trainee Solicitor
Hickey, Catherine	FLAC
Hogan, Kate	UCD Student
Horgan, Ronan	Barrister-at-Law
Hughes, Ian	TASC
Humphreys, Gerard	Barrister-at-Law
Hynes, Geraldine	Equality Authority
Irwin, Cyan	Earthwatch
Jaichand, Dr Vinodh	Irish Centre for Human Rights
Jeffers, James	NUIG Student
Jennings, Anne	Irish Traveller Movement
Joyce, David	Irish Traveller Movement
Joyce, Paul	FLAC

Kearney-Grieve, Brian	The Atlantic Philanthropies
Kehoe, Denise	NUIG Student
Kelly, Nuala	Irish Human Rights Commission
Kelly, Paddy	Northern Ireland Children's Law Centre
Kenna, Dr Padraic	Law Faculty NUI Galway
Kennedy, Ciara	NUIG Student
Kennedy, Eamonn	RTÉ Solicitor
Kennedy, Roisin	FLAC
Keogh, Paddy	Barrister-at-Law
Kevany, Seana	FLAC
Keys, Mary	Law Faculty NUIG
Kilbane, Ann	NUIG Student
Kilkenny, Michael	UCD Student
Kiniry, Sean	Cara Cheshire House
Lakes, Maria	TCD Student
Langan, John	Barrister-at-Law
Lanigan, Cathy	Respond! Housing Association
Larkin, Sile	Equality Authority
Lawlor, Ciaran	UCD Student
Leigh-Doyle, Alve	NUIG Student
Leyden, Kyle	Barrister-at-Law
Lindsay, Caroline	Chief State Solicitor's Office
Linehan, Mary	Noonan Linehan Carroll Coffey Solicitors
Lloyd, Mary	Family Support Agency
Love, Sean	Director, Amnesty International
Lucey, Sinead	Irish Traveller Movement
Lunny, Leonie	Comhairle
Lynch, Esther	Irish Congress of Trade Unions
Lynn, Michael	Barrister-at-Law
Macauley, Rachel	FLAC
MacGuill, Conor	MacGuill & Co., Solicitors
MacSweeney, Phil	Cork City & South Council CIC
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Madden, Sarah	
Magennis, Sophie	Office of the Ombudsman for Children
Maguire, Matthew	LLM Student NUIG
Maguire, Maureen	Louise Moloney & Co., Solicitors
Maguire, Paddy	Barrister-at-Law
Malone, David	Eurolaw Environmental Consultants
Manning, Dr Maurice	President, Irish Human Rights Commission
McCall, Kevin	FLAC
McCallion, Maura	Law Centre Northern Ireland
McCann, Aoife	Barrister-at-Law
McCarthy, Catriona	Arthur Cox Solicitors
McCloskey, Anne	Crumlin CIC
McColgan, Miriam	Griffith College Student
McDaid, John	Legal Aid Board
McDonagh, Jeanne	Bar Council of Ireland
McDonnell, Natalie	IFPA
McGillycuddy, Miriam	FLAC Volunteer
McGonagle, Marie	NUIG Law Department
McGovern, Ray	WG Bradley Solicitors
McGuinness, the Hon. Mrs	

Justice Catherine	President, Law Reform Commission
Maguire, Matthew	LLM Student NUIG
McIntyre, TJ	Law Faculty UCD
McKittrick, Freda	Barnardos
McLaughlin, Angie	CARI Foundation
McLaughlin, Sharon	NUIG Student
McLoughlin, Amanda	Comhairle
McMahon, Niamh	TCD Student
McMeel, Kevin	Chief State Solicitors Office
McOsker, Kevin	NUIG Student
McWilliams, Prof Monica	Chief Commissioner, NIHRC
Meaney, Mary	National Disability Authority
Mellon, Grainne	TCD Student
Mitrow, Elizabeth	FLAC
Mohan, Hugh	Senior Counsel, Chairperson, Bar Council
Molony, Anna	Chief State Solicitor's Office
Monaghan, Ciara	Trainee Solicitor
Mooney, Rachael	The Community Foundation for Ireland
Moore, Alison	Office of the Attorney General
Moore, Michael	Michael Moore Solicitors
Morgan, Tom	Office of the Ombudsman
Mulcahy, James	NUIG Student
Mulcahy, Jane	Law Reform Commission
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